TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 637.

THE UNITED STATES, APPELLANTS,

vs.

ALEXANDER CALDWELL.

No. 638.—CROSS-APPEAL.

ALEXANDER CALDWELL, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED NOVEMBER 6, 1873.

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1 *Petition.—Filed July* 11, 1870.

U. S. Court of Claims.

ALEXANDER CALDWELL
vs.
THE UNITED STATES. } No. 6190.

To the honorable Court of Claims:

The petition of Alexander Caldwell, a citizen of the United States, respectfully represents:

That in the month of March, A. D. 1866, he entered into a written contract with Brevet Colonel Alexander Bliss, an assistant quartermaster, acting for and on behalf of the United States, for the transportation of Government stores upon route No. one, west of the Missouri River. A copy of this contract and of the tabular statement referred to in it is hereto annexed and marked Exhibit A, and claimant prays may be considered and read as part of this petition.

Petitioner further shows that immediately upon the execution of said contract, he provided himself with all the necessary means of transportation, and all other requisites to carry out the same on his part, and he avers that at all times during the existence of said contract he complied with all the stipulations on his part to be performed, and was ready and willing to transport all freight and merchandise which might be required of him by the officers of the United States.

Petitioner further shows that in entering into the said contract he assumed great responsibilities, and incurred heavy expenses and risks, relying upon the profits which he would make in transporting such freight at the prices agreed upon. That by the terms of the said contract he became entitled to transport all of the military stores and supplies which the United States might require transportation for on

2 the route and during the time specified in said agreement, excepting only such supplies as the Government might transport by its own means of conveyance.

That in violation of this contract, and the rights of your petitioner under it, Brevet Brigadier-General W'm Myers, in charge of the United States military depot at Omaha, in the Territory of Nebraska, in the months of June to September, inclusive, A. D. 1866, procured transportation by railroad from Omaha, Nebraska, to Columbus, Neb., of four millions one hundred and thirty thousand (4,130,000) pounds of Government military stores; and from Columbus, Neb., under contracts or arrangements with one Herman Kountze, to Fort Laramie, D. T., of one million six hundred and eighty thousand pounds (1,680,000) of said stores; and from Columbus, Neb., to Fort Reno, and to points beyond, of one million one hundred thousand pounds of said stores; and from Columbus, Neb., to Fort McPherson, Neb., one million three hundred thousand pounds of said stores, said transportation having been procured not by the use of the Government means of transportation.

Petitioner further shows that if he had transported the said four millions one hundred and thirty thousand pounds (4,130,000) of freight under the terms of said contract, as he was entitled, and was ready and purposed to do, he would have received therefor three hundred fifteen thousand one hundred and fifty-nine dollars, ($315,159;) that the necessary and reasonable expenses for the transportation of said freight would have been two hundred and forty-nine thousand nine hundred and sixty-nine dollars, ($249,969.)

1 *Petition.—Filed July* 11, 1870.

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Petitioner further shows that immediately upon the execution of said contract, he provided himself with all the necessary means of transportation, and all other requisites to carry out the same on his part, and he avers that at all times during the existence of said contract he complied with all the stipulations on his part to be performed, and was ready and willing to transport all freight and merchandise which might be required of him by the officers of the United States.

Petitioner further shows that in entering into the said contract he assumed great responsibilities, and incurred heavy expenses and risks, relying upon the profits which he would make in transporting such freight at the prices agreed upon. That by the terms of the said contract he became entitled to transport all of the military stores and supplies which the United States might require transportation for on
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Petitioner further shows that if he had transported the said four millions one hundred and thirty thousand pounds (4,130,000) of freight under the terms of said contract, as he was entitled, and was ready and purposed to do, he would have received therefor three hundred fifteen thousand one hundred and fifty-nine dollars, ($315,159;) that the necessary and reasonable expenses for the transportation of said freight would have been two hundred and forty-nine thousand nine hundred and sixty-nine dollars, ($249,969.)

That the difference between the sum which he would have been entitled to receive, and the reasonable expense of performing the service, viz, sixty-five thousand one hundred and ninety dollars, ($65,190,) is the amount of damages which he has sustained by the said breach of the said contract on the part of the United States.

Petitioner further shows that in order to provide the necessary means to carry out and perform the said contract, petitioner, when he entered into said contract, associated with himself, with the knowledge of the agents of the United States, L. T. Smith, of Leavenworth, Kansas, James Duffy, of Marietta, Pa., and Thomas A. Scott, of Philadelphia, Pa., all of whom were associated with petitioner when the said contract was signed by petitioner; and petitioner shows that by the terms of his agreement with the said parties he will be required to pay each of them a due proportion of whatever he may recover in this suit.

3 Your petitioner further shows that he and each of his associates have at all times borne true allegiance to the Government of the United States; and that he, and each of them, have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and he prays the judgment of this honorable court for the said sum of sixty-five thousand one hundred and ninety dollars, ($65,190,) and for such other and further relief as the nature of the case may show he is entitled to.

HARVEY SPALDING,
Attorney for Claimant.

Harvey Spalding, being duly sworn, deposeth that he is attorney for claimant; that no assignment or transfer of said claims, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as therein stated are true.

HARVEY SPALDING.

Sworn to and subscribed before me this 11th day of July, 1870.
[SEAL.] EDM. F. BROWN,
Notary Public.

Claimant's solicitors:
C. F. PECK and HARVEY SPALDING,
Washington, D. C.

EXHIBIT A.—*Contract for route No.* 1 *for* 1866.

This agreement, made and entered into this 12th day of March, one thousand eight hundred and sixty-six, by and between Brevet Colonel Alexander Bliss, assistant quartermaster U. S. Army, in charge of fourth division, Quartermaster-General's Office, for and on behalf of the United States of the first part, and Alexander Caldwell, of the

4 city and county of Leavenworth, in the State of Kansas, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows, viz:

ARTICLE I. That the said Alexander Caldwell shall receive at any time, in any of the months from April to September, inclusive, during the year one thousand eight hundred and sixty-six, from the officers or

agents of the Quartermaster's Department at Forts Leavenworth and Riley, in Kansas, at Fort Kearney, Nebraska Territory; Fort Sedgwick, Colorado Territory; Fort Laramie, Dakota Territory; and at any points or places at which posts or depots shall be established during the continuance of this contract, on the west bank of the Missouri River, north of Fort Leavenworth and south of latitude 42 degrees north, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition, by the officer or agent of the quartermaster's department, at any or all of the above points or places, and transport the same with dispatch, and deliver them, in like good order and condition, to the officer or agent of the quartermaster's department on duty or designated to receive them at any of the posts or depots which are now or may be hereafter established in the Territory of Colorado north of 40 degrees north, and at Denver City, and in the Territories of Nebraska, Dakota, Idaho, and Utah, south of latitute 44 degrees north, including Fort Reno, and east of longitude 114 degrees west of Greenwich, agreeably to the instructions he may receive from the officer or other authorized agent of the quartermaster's department charged with the duty of forwarding the stores and supplies at Fort Leavenworth or other place of departure; and for the faithful performance of such service he shall be paid in the manner hereinafter provided for in Article XV of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

ARTICLE II. That the said Alexander Caldwell agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts, depots, or stations named in Article I, or from and to any other posts, depots, or stations that may be established within the district named in said article, any number of pounds of military stores and supplies, from and between one hundred thousand pounds and ten millions of pounds in the aggregate.

ARTICLE III. That the said Alexander Caldwell agrees and binds himself to employ and have at Fort Sedgwick, Colorado Territory, a suitable person to act as his agent, to whom notice shall be given by the United States, through their officer or agent, of the stores which the said Alexander Caldwell will be required to transport from Fort Sedgwick, or of any change in the destination of said stores beyond Fort Sedgwick; and that said agent shall conform to such directions, and forward the stores to their new destination without unnecessary delay. The said Alexander Caldwell agrees and binds himself to have, in the vicinity of Fort Leavenworth, Kansas, a place of business or agency; and for the stores to be forwarded from Fort Leavenworth and Riley, or from any other points of departure on or near the Missouri River, notice shall be given to the said Alexander Caldwell at said place of business or agency in the vicinity of Fort Leavenworth, Kansas.

ARTICLE IV. In order that the said Alexander Caldwell shall be in readiness to meet the demands and requirements made upon him for transportation under this contract and agreement, due notice shall be given him or his agent of the quantity and kind of stores to be transported at any one time; at what point the stores will be ready for delivery to him, and the place of their destination, subject to such changes as may be decided upon while in transitu, as herein provided for; that is to say, for any quantity less than three hundred thousand pounds, fifteen days' notice; for any quantity between three hundred thousand

and six hundred thousand pounds, twenty days' notice; for any quantity between six hundred thousand and one million of pounds, thirty days' notice; for any quantity between one million of pounds and two million five hundred thousand pounds, forty days' notice; for any quantity between two million five hundred thousand pounds and five millions of pounds, fifty days' notice; for any quantity between five millions of pounds and ten millions of pounds, and for ten millions of pounds, sixty days' notice: Provided, however, that when stores are to be transported from Fort Sedgwick, except upon the arrival of a train or trains sufficient to transport such stores, or their having sufficient means of transportation at the post, an increase of ten per cent. upon
6 the above-stated time of notice shall be given to the agent at that post.

ARTICLE V. The military stores and supplies which shall be transported under this agreement shall be consigned to their respective destinations, and receipts on bill of lading shall be given by the officer of the Quartermaster's Department serving at the place of consignment for the full quantity of stores that shall be delivered, and upon such receipts payment shall be made to the said Alexander Caldwell, as hereinafter provided.

ARTICLE VI. That all the means of transportation to be used by the said Alexander Caldwell, under this agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department at the place of departure, and such only shall be used as may be then and there accepted by him. And it shall be the duty of the officer or agent of the Quartermaster's Department forwarding stores to certify, upon the bill of lading of each train, that he has inspected the means of transportation composing said train, and accepted the same. The stores turned over to the said Alexander Caldwell for transportation shall be transported in trains of not less than twenty-five wagons each, whenever the officer or agent of the Quartermaster's Department at the point of starting shall turn over a sufficient quantity of stores to make up the loading of that number of wagons; and in all cases the stores turned over for transportation shall be delivered to the consignee by the contractor in the same lots or invoices as received at points of departure. But at Fort Leavenworth, or other point of departure on the Missouri River, the contractor is permitted to receive stores in amounts of not less than fifty thousand (50,000) pounds, and load the same into trains of not less than ten wagons, to be consolidated at a point not exceeding one hundred (100) miles from point of departure into trains of not less than twenty-five (25) wagons.

ARTICLE VII. That to ensure the delivery of the stores and to aid the contractor in the execution of his agreement, certificates setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of its journey, shall be given by the officers or agents of the Quartermaster's Department, at the following points:

At Forts Kearney, Sedgwick, Halleck, and Laramie; at the
7 crossing of the Sweet Water and at Fort Bridger, or at such of them as are on the route to destination of the respective trains. Upon each certificate so given, setting forth the good condition of the train, payment shall be made to the contractor for the service rendered to that point, and upon the arrival of the train at its place of destination or delivery, the officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading in accordance with the finding of a board of survey, as hereinafter provided, stating

the quantity and condition of the stores delivered. Upon which indorsement payment shall be made as per contract, deducting the amount of any payment or payments previously made, and also for any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor, at the rate specified in Article VIII of this agreement.

ARTICLE VIII. In all cases when stores have been transported by the said Alexander Caldwell under this agreement, a board of survey, to be applied for in writing by the contractor or his agent, (one member of which board shall be an officer on duty in the Subsistence Department,) shall be called without delay, on their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported; and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss, deficiency, or damage, and state whether it was attributable to neglect or want of proper care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall govern the payments to be made on it.

For loss of weight due to shrinkage, and for leakage of vinegar, molasses, or other liquids, the contractor shall not be held liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agent. For loss, deficiencies, or damage attributable to the contractor he shall pay double the cost at the point where he receives the articles; which cost shall be determined by taking the cost-price at place of purchase and adding thereto the cost of transportation to the point where the stores were turned over to the contractor, and no freight whatever
8 shall be paid on stores deficient. In case of damage, freight shall be deducted in proportion to the quantity damaged. Should no board of survey be called when requested by contractor through failure on the part of the quartermaster's department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. But before such payment is made, the fact must be shown that the contractor or his agent did make application in writing to the quartermaster for a board of survey. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after-payments that may become due.

Transportation to be paid in all cases according to the distance from the place of departure to that of delivery; the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies, and in no case to exceed the distance by the usual and customary route.

ARTICLE IX. That in case any one or more of the trains of the said Alexander Caldwell are stopped or delayed at any time or place exceeding two days, either by the orders of an officer or agent of the Quartermaster's Department or the commanding officer of a post, or of troops present, or by failure of the proper officer to convene a board of survey when requested by contractor, in writing, the contractor shall be paid upon a statement, in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train, for each and every day they may be so delayed.

But no such payments shall be made when the order for the stoppage

of a train, or any portion thereof, is given because of the inability of the contractor to proceed with the said train, or any portion thereof, by reason of deficiency in quantity or quality of means of transportation, or by any act or fault of his. In case the officer or agent of the Government aforesaid shall refuse to furnish the statement in writing above referred to, then the delay shall be paid for, as above, on the affidavits or other satisfactory evidence of credible and competent witnesses.

All orders from officers or agents of the Government to halt trains, shall be given to the contractor or his agent in writing, expressing fully the reasons therefor: Provided, that when such delay is occasioned by proper military authority, for the protection of the trains, the delay shall not entitle the contractor to any compensation, but the
9 time so lost shall be allowed him in computing the time of the trip.

ARTICLE X. The said Alexander Caldwell shall be furnished with a suitable escort for the protection of the supplies, should he be required to transport, in any one train, a less quantity than one hundred and twenty-five thousand pounds; but whenever required to transport one hundred and twenty-five thousand pounds or more, then no escort shall be furnished.

ARTICLE XI. That the said Alexander Caldwell shall transport all the military stores and supplies for which the Quartermaster's Department may require wagon-transportation by contract, on the route specified by this agreement, during the year one thousand eight hundred and sixty-six, provided the weight of such military stores and supplies shall not exceed, in the aggregate, ten millions of pounds; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so.

ARTICLE XII. That all stores shall be delivered in a reasonable time after being turned over to the contractor, not to exceed, after May 1st, ten days per hundred miles for mule-trains, and fourteen days per hundred miles for ox-trains, from the time of starting, unless detained by orders en route, which must be produced. And in determining the date of starting, the date of bill of lading shall govern, and the bill of lading shall bear date on the completion of the loading of the train, and the contractor shall be allowed for loading not to exceed two days for each train of twenty-five wagons, and in that proportion for any greater or lesser number of wagons, from the time the stores are turned over to the contractor for transportation, as provided for in Articles I and IV of this agreement.

Any delay beyond such time as specified to be charged to contractor, at the rate allowed for delay caused by orders, as provided in Article IX of this agreement, unless such delay arises from causes beyond the control of the contractor, so determined by a board of survey.

XIII. That in case of failure by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause, on the part of the said Alexander Caldwell, to be in readiness to meet the demands and requirements made upon him for transportation, under this contract or agreement, after due notice shall have been
10 given him or his agents, as provided for in Article IV of this agreement, then the officer or authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies shall have power to supply the deficiency, either by purchase, hire, or special contract, as the said officer or agent may elect,

and the said Alexander Caldwell will be charged with the difference of the cost or expense thus incurred.

ARTICLE XIV. It is understood that, if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure included in this agreement, they shall be carried back upon the same terms and conditions as are herein provided for their transportation forward.

ARTICLE XV. For and in consideration of the faithful performance of the stipulations of this agreement, the said Alexander Caldwell shall be paid, at the office of the Quartermaster's Department at Fort Leavenworth, Kansas, in the legal currency of the United States, according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement.

ARTICLE XVI. It is expressly agreed and stipulated between the parties to this contract, that upon mutual agreement it may be changed, altered, modified, or abrogated, in whole or in part.

ARTICLE XVII. It is expressly understood that no member of Congress, officer, agent, or employé of the Government shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

In witness whereof the undersigned have hereunto placed their hands and seals, at Washington, D. C., the day and date first above written.

Witnesses:

——— ———. [SEAL.]
——— ———. [SEAL.]

11 TABULAR STATEMENT.

Schedule of prices per one hundred (100) *pounds per one hundred* (100) *miles, to be paid Alexander Caldwell, contractor, for the transportation of military stores and supplies under an agreement between Brevet Colonel Alexander Bliss, assistant quartermaster U. S. Army, acting on behalf of the United States, and the said Alexander Caldwell, dated at Washington, D. C., the 12th day of March,* 1866.

SCHEDULE OF PRICES.

Points of starting.	Periods of starting.					
	April.	May.	June.	July.	Aug.	Sept.
From and to points or places named in Art. 1 of above agreement.	$1 45	$1 45	$1 45	$1 45	$1 45	$1 45

12 In the United States Court of Claims.—December term, A. D. 1869.

ALEXANDER CALDWELL *vs.* THE UNITED STATES. } No. 6190.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each any every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that

the said United States are indebted to the said claimant in the sum of sixty-five thousand one hundred and ninety dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

Filed Sept. 10, 1870.

13 In the Court of Claims.

ALEXANDER CALDWELL
vs. } 6190.
THE UNITED STATES.

At a Court of Claims held at the Capitol, in the city of Washington, the 21st day of April, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Alexander Caldwell have and recover of and from the United States the sum of thirty-five thousand eight hundred & sixty-nine dollars, ($35,869.00.)

A true copy of record.

14 In the Court of Claims of the United States, Dec. term, 1872.

ALEXANDER CALDWELL
vs. } 6190.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause, on April 21, 1873, in favor of the claimant, the defendants, by their Attorney-General, on the 3d day of July, 1873, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding three thousand dollars, to wit, thirty-five thousand eight hundred and sixty-nine dollars.

JOHN GOFORTH,
Ass't Att'y-Gen'l.

Filed July 5, 1873.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

15 In the United States Court of Claims.—Dec. term, 1872.

ALEXANDER CALDWELL
vs. } 6190.
THE UNITED STATES.

The petition of Alexander Caldwell respectfully represents he is in-

formed there is error to his prejudice in the judgment rendered by this honorable court in the above-named cause, on the 21st day of April, 1873, and he desires to appeal therefrom.

Wherefore he prays an appeal may be allowed him to the next term of the Supreme Court of the United States.

CHARLES F. PECK,
By THO'S J. DURANT,
For Petitioner.

Filed July 11, 1873.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

16 United States Court of Claims.

ALEXANDER CALDWELL }
vs.
THE UNITED STATES. }

LORING, J.:

The petitioner claims against the United States $65,190 damages, for the breach of a contract for transportation, and the court find the facts to be:

That on the 12th day of March, 1866, the contract, a copy of which is hereto annexed and marked A, was made between the United States, of the first part, and the petitioner, of the second part.

That the contract was for route No. 1, and extended over a district bounded easterly by the east bank of the Missouri River; northerly by the forty-second degree of north latitude; westerly by the one hundred and fourteenth degree of west longitude; and southerly by the forty-fourth degree of north latitude, and included Fort Reno.

At the date of the contract the only military posts on the west bank of the Missouri River, within the said district, were Fort Leavenworth, in Kansas, and Omaha, in Nebraska Territory.

On or before the 30th day of March, 1866, the president of the Union Pacific Railroad advised the Quartermaster-General that the company had sixty miles of their line completed west of Omaha, and that the company expected to complete the first hundred miles by the 10th of June.

In the summer and fall of 1866 the Union Pacific Railroad had extended their line westward to Columbus, Lone Tree, and Kearney's Station, and it offered to the United States a more expeditious and cheaper mode of transportation than wagon-transportation.

In the summer of 1866 the United States had collected at Omaha military stores and supplies, intended for the supply of posts west of the Missouri River, and within the district covered by the contract with the petitioner, and in the year 1866 they sent by said railroad quantities of said stores and supplies from Omaha to Columbus, Lone Tree, and Kearney's Station, the successive termini of the railroad as it was extended westward, as is set forth in the schedule hereto annexed, marked No. 1.

And in the month of June, 1866, the United States contracted with Herman Kountze for the transportation of said stores and supplies from Columbus, Lone Tree, and Kearney's Station to Fort McPherson, Fort

Laramie, and Fort Kearney, on said route No. 1, and copies of said contract are hereto annexed, and marked B and C.

And thereafter the said Kountze, under the said contracts
17 made with him, and in the year 1866, performed the transportation specified in the schedule annexed, and marked No. 2.

Previous to the delivery of the said military stores and supplies to the said railroad, and before the making of the said contracts with Kountze, the petitioner was prepared, and notified the United States of his readiness, to transport the said military stores and supplies under and according to his contract.

Previous to the delivery of said military stores and supplies to said Kountze, but after the making of said contracts with him, the petitioner was prepared and claimed of the United States the right, under his contract, to transport the said military stores and supplies from the termini of said railroad to such places, within his contract, as the United States might designate.

No notice was given by the United States to the petitioner, under his contract, to transport the military stores and supplies transported by said Kountz. But on the 11th of June, 1866, the petitioner was notified by the United States that transportation, under his contract, would not be needed.

The cost of the transportation of said military stores and supplies delivered to said Kountze in any of the months from April to September, inclusive, would have been to the petitioner $1.20 per 100 pounds per hundred miles.

In August, 1867, an account was settled with the petitioner by the Quartermaster's Department for the transportation by him, under his said contract, of 187,804 pounds, from Nebraska City to Camp Douglas and Fort Bridger; and a balance of $15,919.73 was found to be due to the said petitioner on said account, and was paid to and receipted for by him in full for the transportation specified in the said account.

At the hearing of this cause, evidence was offered by the United States to prove—

1. That before the contract with the petitioner was made, the United States proposed to him that the contract should make provision for the delivery to him, for transportation, of military stores and supplies, at points on the railroad as that should be completed; and that the petitioner objected to said provision, and it was not made.

2. That at the execution of said contract with the petitioner he was informed by the officers of the Quartermaster's Department that it would use the railroad for such transportation as far as it could.

And said evidence was rejected.

And on the facts stated we find that the petitioner is entitled to recover of the United States, as damages for the breach of said contract, the sum of $35,869.01, as specified in the schedule hereto annexed, and marked Z, for which sum judgment will be entered for the petitioner.

And, on the whole case, we find as a conclusion of law that by the legal intendment of the contract made between the United States and the petitioner, March 12, 1866, he was entitled to the transportation of all the military stores and supplies sent by them in the months of April to September, inclusive, in the year 1867, from Omaha to the places within the district described in the contract, and that the United States, by delivering such military stores and supplies in said months to the Union Pacific Railroad and Herman Kountze, to be transported by them as hereinbefore stated, committed a breach of the contract with the petitioner.

18 SCHEDULE No. 1.

Military stores and supplies sent by the United States by the Union Pacific Railroad from Omaha to Columbus, Lone Tree, and Kearney's Station.

1. In the months from April to September, inclusive, in 1866:	
To Columbus, 92 miles, pounds	1,600,153
To Lone Tree, 132 miles, pounds	1,187,130
To Kearney's Station, 191 miles, pounds	158,201
	2,945,484
2. In the month of October, 1866:	
To Kearney's Station, 191 miles, pounds	693,946

SCHEDULE No. 2.

Of the transportation performed by said Kountze from Columbus, Lone Star, and Kearney's Station, in 1866.

1. From April to September, inclusive:	
From Columbus to Fort McPherson, 215 miles	171,916
From Columbus to Fort Laramie, 486 miles	1,237,149
From Columbus to Fort Reno, 670 miles	191,088
From Lone Tree to Fort McPherson, 170 miles	985,969
From Lone Tree to Fort Laramie, 448 miles	89,727
From Lone Tree to Fort Reno, 632 miles	111,434
From Kearney's Station to Fort McPherson, 101 miles	35,446
From Kearney's Station to Fort Laramie, 380 miles	122,755
	2,945,484
2. In October:	
Kearney's Station to Fort McPherson, 101 miles	371,462
Kearney's Station to Fort Laramie, 380 miles	322,484

SCHEDULE Z.

Specification of the damages adjudged to the petitioner, being the difference between the contract-price of $1.45 *and the cost,* $1.20 *per* 100 *pounds per hundred miles, of transporting the military stores and supplies, sent by the United States in the year* 1866, *from April to September, inclusive.*

From Omaha to—			
Fort McPherson, 307 miles	1,193,331 pounds	$9,158	81
Fort Laramie, 578 miles	1,449,631 pounds	20,947	16
Fort Reno, 762 miles	302,522 pounds	5,763	04
	2,945,484	35,869	01

19 (The contract referred to in the foregoing findings of the court as Exhibit A is fully set forth in the original petition, a copy of which forms part of this record.)

Exhibit B, referred to in the foregoing findings of the court.

DEPARTMENT OF THE INTERIOR,
"RETURNS OFFICE," *June 20th*, 1870.

I, George W. Evans, clerk in charge of the "Returns Office," do hereby certify that the accompanying contract is a full and complete copy of a contract made between B'v't Brig.-Gen'l W'm Myers, U. S. A., and Herman Kountze, for transportation in Nebraska Territory, on file in this office.

In witness whereof I have hereunto set my hand and affixed the seal of the Department of the Interior the date hereinbefore written.

[SEAL.] GEORGE W. EVANS.

(Copy.)

Articles of agreement made and entered into this sixth day of June, anno Domini one thousand eight hundred and sixty-six, between Brevet Brigadier-General W'm Myers, ass't Q. M. of the United States Army, party of the first part, and Herman Kountze, of the city of Omaha, and Territory of Nebraska, party of the second part:

This agreement witnesseth: That the said Brevet Brigadier-General W'm Myers, ass't Q. M. U. S. Army, for and on behalf of the United States of America, and the said Herman Kountze, of the city of Omaha, and Territory of Nebraska, for himself, his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree, to and with each other as follows, viz:

First. That the said Herman Kountze, his heirs, executors, and administrators, shall transport or cause to be transported from the present terminus of the Union Pacific Railroad, west of the Loup Fork River, near the town of Columbus, Nebraska Territory, or from such intermediate points between the city of Omaha and town of Columbus, Nebraska Territory, as the said Brevet Brigadier-General W'm Myers, ass't q'r'm'r, may direct, such quartermaster's stores, consisting of grain, as are delivered to the said Herman Kountze at the said terminus of the Union Pacific Railroad, or at intermediate point or points between the town of Columbus and city of Omaha, Nebraska Territory, a portion of said grain to be in readiness for shipment from said terminus or intermediate point or points by the thirtieth (30th) day of June,
20 1866, and the whole amount by the thirty-first day of July, 1866; and the said Herman Kountze agrees to deliver, or cause to be delivered, said grain at the following military posts, to wit:

One million six hundred and eighty thousand (1,680,000) pounds, more or less, at Fort Laramie, Dakota Territory; five hundred thousand (500,000) pounds, more or less, at Fort Reno, Dakota Territory; three hundred thousand (300,000) pounds, more or less, at the new fort at the foot of Big Horn Mountain; three hundred thousand (300,000) pounds, more or less, at the new fort at the head of the Yellowstone River. To ensure the delivery of the stores, and to aid the contractor in the execution of his agreement, certificates setting forth the number of the train, the number of the wagons in it, and the condition of the train for the prosecution of its journey, shall be given on application of the contractor or his agents, by the officers or agents of the Quartermaster's Department at the following points, viz: Fort Laramie, D. T., and Fort Reno, D. T. Upon each certificate so given setting forth the good condition of the train, payment shall be made to the contractor for the serv-

ices rendered to that point; and upon the arrival of the train at its place of destination or delivery, the officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading, stating the quantity and condition of the stores delivered; upon which endorsement pay shall be made as per contract, deducting amount of any payment or payments previously made, and also for any articles missing, lost, or destroyed or damaged, and which a board of survey may find to be properly charg'able to the contractor; but for loss of weight due to shrinkage, the contractor, Herman Kountze, shall not be held liable. And in all cases, when stores are short or damaged that have been transported under this contract by the said Herman Kountze, a board of survey may be called for by the contractor or his agents, (one member of the board to be an officer of the Quartermaster's Department, if practicable,) to examine the quality and condition of the stores delivered, and in case of loss, deficiency, or damage, to investigate the facts, and report the apparent causes, assess the amount of the loss, deficiency, or damage, and state whether it was attributable to neglect or want of proper care on the part of the contractor, or to causes beyond his control; and the proceedings of said board of survey, a copy of which shall be furnished the contractor, shall be attached to the bill of lading, and shall govern the payment to be made thereon.

Transportation to be paid in all cases according to the actual distance from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies, and in no case to exceed the distance by the usual or customary route. That, in case any one or more of the trains of the said Herman Kountze are stopped or delayed at any one time or place exceeding two days, either by orders of an officer or agent of the Quartermaster's Department, or the commanding officer of a post or troops present, or by failure of the proper officer to convene a board of survey when requested by the contractor or his agents, in writing, the contractor shall be paid, upon a statement, in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars ($5.00) per diem for each and every team in the train, for each and every day they may be so delayed in excess of the two days held exempt by the provisions hereinbefore specified in this specification.

The said Herman Kountze shall be furnished with a suitable escort for the protection of the supplies, should he be required to transport in any one train a less quantity than one hundred and twenty-five
21 thousand (125,000) pounds; but whenever required to transport one hundred and twenty-five thousand (125,000) pounds or more, then no escort shall be furnished, unless the commanding officer of a post or troops present shall deem that said supplies will be endangered without being accompained by an escort; then suitable protection shall be furnished, whether the trains be of more or less capacity than heretofore named in this contract or agreement, and such protection shall be furnished on the written application of the contractor or his authorized agent.

That, in case of failure by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said Herman Kountze to be in readiness to meet the demands and requirements made upon him for transportation under this contract or agreement, after due notice shall have been given him or his agents, then the officer or agent of Quartermaster's Department charged with the duty of forwarding the stores, shall have power to supply the deficiency, either by purchase, hire, or special contract, as said officer or

agent may elect, and the said Herman Kountze will be charged with the difference of the cost or expense thus incurred.

For and in consideration of the faithful performance of the stipulations of this agreement, the said Hermann Kountze shall be paid, at the office of the Quartermaster's Department at Omaha City, Nebraska Territory, in legal currency of the United States, according to the distance the supplies are transported, and agreeable to the rates herein specified, to wit: One dollar and forty-two cents ($1.42) for each and every one hundred (100) pounds for each and every one hundred (100) miles, and a proportionate amount for any fractional part thereof that said stores have been transported.

It is further agree that the conditions of this agreement may, at any time, be changed by mutual consent of the parties interested.

Third. It is hereby expressly provided that no member of Congress shall be admitted to any share or part herein, or any benefit to arise herefrom.

Fourth. It is hereby expressly understood between the parties hereto that the binding obligation of this agreement, as against the party of the first part, depends upon the loyalty of the party of the second part to the Government of the United States.

In witness whereof the parties hereto have hereunto, in quintuplicate, set their hands and seals this sixth day of June, 1866.

(Signed) WM MYERS, [SEAL.]
Brt. Brig.-Gen'l & Ass't Quartermaster.

(Signed) HERMAN KOUNTZE. [SEAL.]

Witness:

(Signed) WM COBURN.
" JA'S MCKENNA.

I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with Herman Kountze, of the city of Omaha, and Territory of Nebraska; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage, corruptly, to the said Herman Kountze or any other person; and that the papers accompanying include all
22 those relating to the said contract, as required by the statute in such case made and provided.

(Signed) WM MYERS,
Brt. Brig.-Gen'l & A. Q. M.

Subscribed and sworn to before me this 14th day of July, 1866.

(Signed) C. A. DOWNEY,
Notary Public in & for Douglas County, N. T.

Exhibit C, referred to in the foregoing findings of the court.

DEPARTMENT OF THE INTERIOR,
"RETURNS OFFICE," *June 21st*, 1870.

I, George W. Evans, clerk in charge of Returns Office, do hereby certify that the accompanying copy of contract is a full and complete copy of a contract on file in this office, made between Brevet Brig.-Gen'l W'm Myers and Herman Kountze, for transportation of grain in Nebraska Territory, in the year 1866.

In witness whereof I have hereunto set my hand and affixed the seal of the Department of the Interior, this 21st day of June, 1870.

[SEAL.] GEO. W. EVANS,
Returns Clerk.

(Copy.)

Articles of agreement made and entered into this eleventh day of June, anno Domini one thousand eight hundred and sixty-six, between Brevet Brigadier-General W'm Myers, ass't Q. M. of the United States Army, party of the first part, and Herman Kountze, of the city of Omaha, and Territory of Nebraska, party of the second part.

This agreement witnesseth: That the said Brevet Brigadier-General W'm Myers, ass't Q. M. U. S. Army, for and on behalf of the United States of America, and the said Herman Kountze, of the city of Omaha and Territory of Nebraska, for himself, his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz: First. That the said Herman Kountze, his heirs, executors, and administrators, shall transport, or cause to be transported, from the present terminus of the Union Pacific Railroad, west of the Loup Fork River, near the town of Columbus, Nebraska Territory, or from such intermediate points between the city of Omaha and town of Columbus, Nebraska Territory, as the said Brevet Brigadier-General W'm Myers, ass't Q. M., may direct, such quartermaster's stores—consisting of grain—as are delivered to the said Herman Kountze, at the points heretofore named. The same to be in readiness on or before the first (1st) day of July, 1866, or as soon thereafter as may be required, giving due notice to the said Herman Kountze, party of the second (2nd) part. And the said Herman Kountze agrees to deliver, or cause to be delivered, said grain at the following-named military posts, to wit, twenty-five thousand (25,000) bushels, being one million three hundred and fifty thousand (1,350,000) pounds, more or less, at Fort McPherson, Nebraska Territory. Upon the arrival of the train at its place of destination or delivery, the
23 officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading, stating the quantity and condition of the stores delivered, upon which endorsement pay shall be made as per contract, deducting amount of any payment or payments previously made, and, also, for any articles missing, lost, or destroyed, or damaged, and which a board of survey may find to be properly charg'able to the contractor. But for loss of weight due to shrinkage, the contractor, Herman Kountze, shall not be held liable. And, in all cases where stores are short or damaged, that have been transported under this contract by the said Herman Kountze, or by his direction, a board of survey may be called for by the contractor or his agents, (one member of the board to be an officer of the Quartermaster's Department, if practicable,) to examine the quantity and condition of the stores delivered, and, in case of loss, deficiency, or damage, to investigate the facts and report apparent causes, assess the amount of the loss, deficiency, or damage, and state whether it was attributable to neglect or want of proper care on the part of the contractor, or to causes beyond his control; and the proceedings of said board of survey, a copy of which shall be furnished the contractor, shall be attached to the bill of lading, and shall govern the payment to be made thereon.

Transportation to be paid in all cases according to the actual distance from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies, and in no case to exceed the distance by the usual or customary route.

That in case any one or more of the trains of the said Herman Kountze

are stopped or delayed at any one time or place exceeding two days, either by order of an officer or agent of the Quartermaster's Department or the commanding officer of a post or troops present, or by failure of the proper officer to convene a board of survey when requested by the contractor or his agent, in writing, the contractor shall be paid upon a statement, in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars ($5) per diem, for each and every team in the train, for each and every day they may be so delayed in excess of the two days held exempt by the provisions heretofore specified in this specification.

The said Herman Kountze shall be furnished with a suitable escort for the protection of the supplies, should he be required to transport in any one train a less quantity than one hundred and twenty-five thousand (125,000) pounds. But whenever required to transport one hundred and twenty-five thousand (125,000) pounds, or more, then no escort shall be furnished.

That, in case of failure, by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said Herman Kountze to be in readiness to meet the demands and requirements made upon him for transportation under this contract or agreement, after due notice and time shall have been given him or his agents, then the officer or agent of the Quartermaster's Department charged with the duty of forwarding the stores shall have power to supply the deficiency, either by purchase, hire, or special contract, as said officer or agent may elect, and said Herman Kountze will be charged with the difference of the cost or expense thus incurred.

For and in consideration of the faithful performance of the stipulations of this agreement, the said Herman Kountze shall be paid at the office of the Quartermaster's Department, at Omaha City, Nebraska Territory, in legal currency of the United States, according to
24 the distance the supplies are transported, and agreeable to the rates herein specified, to wit, one dollar and forty cents ($1.40) for each and every one hundred (100) pounds for each and every one hundred miles, and a proportionate amount for any fractional part thereof that said stores may be transported.

It is further agreed that the conditions of this agreement may, at any time, be changed by mutual consent of the parties interested.

Third. It is hereby expressly provided that no member of Congress shall be admitted to any share or part herein, or any benefit to arise herefrom.

Fourth. It is hereby expressly understood between the parties hereto that the binding obligation of this agreement, as against the party of the first part, depends upon the loyalty of the party of the second part to the Government of the United States.

In witness whereof the parties hereto have hereunto, in quintuplicate, set their hands and seals this eleventh day of June, 1866.

(Signed) WM MYERS, [SEAL.]
Bv't Brig.-Gen'l & Ass't Quartermaster.

(Signed) HERMAN KOUNTZE. [SEAL.]

Witnesses:
H. W. YATES.
W. H. S. HUGHES.

[c't int. rev. stamp, June 11th, 1866. For exchange.]

25 United States Court of Claims.

ALEXANDER CALDWELL
vs.
THE UNITED STATES.

LORING, J., delivered the opinion of the court:

All the questions made in this case are on the construction of the contract; that is, in the usual form of transportation contracts; and though these have frequently been the subjects of litigation here, the precise questions now presented have not been before adjudicated here.

The petitioner claims that, under his contract, he was entitled to transport all the military stores and supplies sent by the United States in the year 1866 from and to the places within the district described in his contract; and he alleges that the United States, by employing Herman Kountze to transport in that year such military stores and supplies from and to places within that district, committed a breach of the contract.

The United States deny the claim of the petitioner, and contend that, under his contract, he was entitled to transport only such military stores and supplies as they required to be sent by wagon transportation from the places specified and described in the contract; and they allege that no wagon transportation was required or employed by them from such places, and that, therefore, there was no breach of the contract.

The questions thus raised are to be determined by ascertaining the legal intent of the contract, and the legal intent of a contract is what the parties were mutually bound to understand from its terms, construed with reference to its subject-matter and the circumstances in which it was made.

The terms of the contract are as follows:

"ARTICLE 1. That the said Caldwell shall receive at any time in any of the months from April to September, inclusive, during the year 1866, from the officers or agents of the Quartermaster's Department at Forts Leavenworth and Riley, in Kansas; at Fort Kearney, Nebraska Territory; Fort Sedgwick, Colorado Territory; Fort Laramie, Dakota Territory, and at any points or places at which posts or depots shall be established during the continuance of this contract on the west bank of the Missouri River, north of Fort Leavenworth and south of latitude 44° north, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition, at any or all of the above points or places, and transport them, in like good order and condition, to the officer or agent of the Quartermaster's Department on duty, or designated to receive them," &c.

And the second article of the contract is as follows:

"ARTICLE 2. That the said Alexander Caldwell agrees, and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts, depots, or stations named in Article 1, or from and to any other posts, depots, or stations that may be established within the district named in said article, any number of pounds of
26 military stores and supplies, from and between one hundred thousand pounds and ten millions of pound in the aggregate."

And while the covenants by the petitioner are so full and express to transport all the military stores and supplies that shall be offered to

him, within the maximum of ten millions of pounds, there is not in the contract any express covenant or agreement on the part of the United States to offer him, for transportation, any military stores or supplies whatever. The contract in this respect is therefore in its form unilateral, and the question is whether, and how far, it should be modified by considerations of the subject-matter and the circumstances in which it was made.

The subject-matter of the contract is the supply and maintenance of the military posts in the western wilderness, and the circumstances in which it was made are, the absolute necessity of transportation, and of a quantity sufficient for the purpose contemplated, and the outlay the petitioner must make for the means of, and arrangements for, the service, before he could receive anything under the contract; and the parties to the contract knew all these things and their effect on each other.

The circumstances offered to the contractor certainty of employment, and to such an extent as would make his undertaking remunerative; but these advantages of and inducements to the contract depended entirely on the fact that the transportation should be given to him; so that that fact made the whole value of the contract to him, and his only motive for entering into it. And the United States knew this, and had therefore no right to assume, and could not have believed, that the contractor intended or would have agreed to take upon himself the heavy and costly burdens of the contract, and make the expenditures of money and labor a preparation for its continued service required, and yet leave it to be determined afterward by any quartermaster's notions of expediency, or by his pleasure or caprice, whether the contract should be performed or defeated, or made profitable or ruinous to him who had undertaken it.

And the law draws no such conclusion; for where one party to a contract knows that his action under it involves not only the whole consideration to be received, but also a large preparatory outlay made by the other party, the former knows that the other party's preparatory expenditure under the contract is to be so much paid in advance for his own action under it, like part prepayment for a chattel sold; and the law holds him to the bargain in the one case, for the same reason that it does in the other. A consideration rendered implies its equivalent, and therefore the law, in construing a contract like this, from the express obligation of the one party, implies the duty of the other, and thus gives to the contract that mutuality which is absolutely necessary to its equity.

In the case of the United States vs. Speed and al., (8 Wal., 77,) the action was on a contract for packing hogs to be furnished by the United States, and the breach alleged was, that the United States had not furnished the hogs; and it was contended in defense that, by the terms of the contract, the United States were not bound to furnish any given number of hogs. As to this the Supreme Court said as follows:

"Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of the plaintiffs requires the expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable the plaintiffs to comply with their promise and covenant."

27 We think this decision makes the rule of law for this case, and, on its authority we hold that, by the legal intendment of the contract, the petitioner was entitled to, and it was the duty of the United

States to offer to him, the transportation of all the military stores and supplies sent by them, in the time, and from and to the places within the district, specified in the contract.

It is observable, that neither the contract nor the circumstances in which it was made furnish any rule or suggest any reason for dividing the transportation or limiting the duty of the United States to the offer of any part less than the whole of it. So that, if the legal intent of the contract entitles the petitioner to any transportation, it entitles him to all used by them within the time and district covered by the contract.

The next question is, what is the time covered by the contract? The first article provides as follows: "Article 1. That the said Alexander Caldwell shall receive at any time, in any of the months from April to September, inclusive, during the year 1866," &c., and then follow the provisions for transportation from and to the points of departure and delivery. Thus, this article by express stipulation and by the rule, "expressio unius, est exclusio alterius," confines the transportation to be done to the months "from April to September, inclusive," and it is observable that the schedule annexed to the contract, for the purpose of specifying in a tabular form its places and times of departure and prices, mentions only the months above named. And, we think, that the contract obliged the petitioner to receive and the United States to offer to him the military stores and supplies sent by them in those months and those only; and that the contract was broken by the delivery to Herman Kountze of such stores and supplies in those months and no others, and, for that reason, we have measured the petitioner's damages by the military stores and supplies transported by Kountze in those months and no others.

It may be that the parties expected that all the stores and supplies needed for the year would be transported in the months specified, in which the transportation could be best done. That would be a reason why the contract was made as we find it, but none for our departure from it.

But it was contended for the petitioner that, by the eleventh article, he was entitled to the transportation of all the military stores and supplies delivered by the United States for transportation within his district, during the year 1866. The eleventh article provides as follows, viz:

"That the said Alexander Caldwell shall transport all the military stores and supplies for which the Quartermaster's Department may require wagon transportation by contract on the route specified by this agreement during the year 1866, provided the weight of such military stores and supplies shall not exceed in the aggregate ten millions of pounds," &c.

We think this eleventh article is only a provision for additional transportation that may be required in other months than those above specified, and under another contract than this, to be made, if and when such additional transportation should become necessary.

It is observable that this contract was made March 12, 1866, and then the full amount of transportation that might be required for that year could not be certainly told; for transportation in other months than those specified might become necessary from circumstances or accidents that could not be foreseen. So that, without a provision for such additional transportation in other months, the arrangements for the
28 year 1866 would not be complete. And such additional transportation would require another contract, for the price of transportation in the fall and winter months, from its greater difficulties,

might require a different price from the single price specified in the contract for the spring and summer months named. And it is to be recollected that if the contract covered the year 1866, the United States would have the selection of its months for transportation, for they could offer it in any months of that year they pleased, and compel the contractor to carry the ten millions of pounds, in the difficulties and exposures of the winter months, for the same price that is fixed by Article I for the spring and summer months named in it. This would be a ruinous hardship to the contractor, and we think that the specification of the months in the first article and in the tabular schedule is made to exclude it, and to confine the transportation to be done for the price specified in the months specified.

And we think this is indicated by the words used in the eleventh article. The words are, "for which the quartermaster may require wagon transportation by contract." It is manifest that the transportation which the eleventh article refers to is to be under a contract, and the words "may require," of their own force, indicate a future contract. For a contract which a man "may require" cannot denote a contract already existing.

And the last clause of the eleventh article is as follows: "Yet nothing herein contained shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so." And this provision is made because the additional transportation might only be required from one fort to another or between neighboring places; and for such transportation the horses and wagons always attached to forts might be sufficient, while for transportation of millions of pounds for the whole of a route, reaching to nearly a thousand miles, they would be entirely insufficient. And they are never used for such a purpose; so that the clause cited shows that the eleventh article relates to other transportation than that provided for in the first and second articles.

The defense made to this action by the United States was that by the express terms of the contract the petitioner was entitled only to the wagon transportation used by the United States from points of departure on the Missouri River; and that Columbus, Lone Tree, and Kearney Station, at which places stores and supplies were delivered to Kountze, were progressive termini of the railroad and were not within the petitioner's contract. As to this, the first article provides that the petitioner shall receive military stores and supplies at certain forts named, "and at any points or places at which posts or depots may be established during the continuance of this contract on the west bank of the Missouri River."

And it was contended that, as this contract was made by military authority, and related to military affairs, the words "posts and depots" were to be construed in their strictly military sense, and as they are used in the Army Regulations, and thus be confined to military posts and depots. But the words posts and depots are not exclusively military words, nor exclusively so used; and it is observable that, in contracts made by military authority and in relation to military affairs, as in the contracts made with Herman Kountze, and in evidence in this case, where the intent is to confine the contract to military stations, it is so expressed in terms, and the words used are "military posts." And the words "posts and depots," in their proper meaning, include any and all kinds of posts and depots; and we see no reason for restricting the convenience of the United States to only one class of posts and depots.

29 Nor did the United States. For, as is shown by the evidence in the case, they, under this contract, delivered military stores and supplies to the petitioner at Nebraska City, for transportation thence by him, and he transported them to Fort Bridger and Camp Douglas, and the United States paid him for it; and Nebraska City is not, and is shown by the testimony not to have been, a military post or depot, but a place where the United States had collected and deposited stores for transportation. And this mutual action of the parties under the contract construes its words, "posts and depots," conclusively between them, and in strict conformity with the rules of law; for, in a transportation contract, its terms are to be construed in reference to its purpose. And then the words "posts and depots" will include military or railroad depots and stations, or any other places where stores and supplies are collected and deposited for transportation, as was the case at Nebraska City, Columbus, Lone Tree, and Kearney Station. All of these places are on the route and within the district covered by the petitioner's contract, and we think they are within the operation of the contract, and within its words in its second article, viz: "From the posts, depots, or stations named in Article I, or from and to any other posts, depots, or stations that may be established within the district named in said article."

It is true that Columbus, Lone Tree, and Kearney Station are not "on the west bank of the Missouri River," if those words mean the water-line of the river. But we think they are not to be so confined, nor does the contract so confine them; for its third article refers to points of departure as "on or near the Missouri River;" and, we think, the phrase "west bank of the Missouri River" is used merely to denote the most easterly line of the district covered by the contract.

But, however all this may be, and admitting that the words "posts and depots" are to be construed in the strictly military sense for which the counsel for the United States contended, then it is certain that Omaha was a military post and depot, for it was the military headquarters of the Department of the Platte, and it was literally "on the west bank of the Missouri River," and all the corn, to the transportation of which we have adjudged the petitioner to be entitled, was, after this contract was made, and "from April to September, inclusive, in the year 1866," collected by the United States at Omaha, and sent thence by them over the route No. 1, to forts within the district described in the contract. Thus Omaha was a military post and depot, within the contract, however its words are construed, and it was on the west bank of the Missouri River, and it was established, as a post or depot, during the contract by the United States, by the collection and deposit there of military stores and supplies, which were to be and were transported thence, in the months from April to September, inclusive, to forts within the district covered by the contract.

And it was a point of departure, within the contract, and it has been officially so declared; for, on the 30th of March, 1866, after the execution of the contract, an order was sent from the Quartermaster-General at Washington, to Saint Louis, as instructions to General Easton, senior and supervising quartermaster of the Military Division of Mississippi, and by him sent to Omaha as instructions to General Myer, chief quartermaster of the Department of the Platte; and in that order the Quartermaster-General instructed his subordinates in reference to this contract, as follows:

"You will observe that the contract on route No. 1 provides for any points of departure on the Missouri River below 42° north.

"Whenever it shall be for the interest of the Government, Nebraska City, or Omaha City, or other places on the Missouri River should be the points of departure for the wagon-trains."

And General Myer, who was charged with the execution of this contract, in direct reference to performance under it, treated Omaha as a point of departure; for, in May, 1866, at Saint Louis, Missouri, he informed the petitioner that large quantities corn would be purchased and shipped from Omaha, and inquired of the petitioner if he would require the full notice, as the time mentioned in the contract to be given, and the petitioner replied that he would do all in his power to comply with the orders given him; and, on all this evidence, we think that it is not to be questioned that Omaha was understood and intended by the parties to this contract to be a point of departure within it, and, geographically and as a matter of fact, it certainly was within the district covered by the contract.

But the United States claimed that, notwithstanding the contract, they had the right to transport stores and supplies from Omaha to the progressive termini of the railroad as it advanced toward completion, and deliver them at such termini to any one they pleased; and they offered evidence to show that they proposed to insert provisions for that purpose in the contract, which were not inserted because the petitioner objected to them; and that, at the execution of the contract, the petitioner was informed by officers of the Quartermaster's Department that it would use such transportation by railroad. All this evidence was rejected for the reasons that the proposals and discussions that lead to and terminate in a written contract cannot be used to vary its express terms; and these, which are the final and mutual declarations of both parties, cannot be varied by parol evidence, nor by the declarations of either of the parties made before, or at, or after the execution of the contract.

We therefore must take the contract as it was executed, and we think there is nothing in it which reserves to the United States the right claimed for them, and if the decision of the Supreme Court which we have cited has been correctly applied to this contract, and because of the express obligations in it on the part of the petitioner, it was the implied duty of the United States to offer him the transportation of the military stores and supplies sent by them within the time, and from and to the places within the district covered by the contract, then the breach of the contract and the injury to the petitioner were the same, whether such transportation was given to the railroad or to another contractor, or parcelled out between them.

It was contended by the United States that the petitioner had, previously to this suit, settled all his claims under this contract at the Treasury; but the only evidence of this was the payment to, and the receipt by, him for the money due him for transportation done by him, from the city of Nebraska to Fort Bridger and Camp Douglas; and the receipt in terms confines the settlement made to that transportation, and it cannot be applied to anything else, for that, as the receipt shows, was all the parties intended to act upon. The Third Auditor certifies that the voucher to the account "appears to be the final payment under the contract therein referred to." But this must be taken to mean that it is the last payment made to the petitioner, so far as shown by the records of the Treasury, for that is all the Third Auditor could know, or that he was authorized to certify.

And a compromise at the Treasury cannot be presumed, for the officers of the Treasury have no authority to make any. Their only authority

is to pay what they find to be due. And they have no more
31 right to pay less than they have to pay more. And a public officer's payment of a sum to which he is limited by his official duty has none of the elements of a compromise, and can furnish no presumption of any. And the only presumption arising upon a settlement at the Treasury is, that the payment was made and received as the amount found due by the accounting officer.

DRAKE, Ch. J., dissenting:

This suit is for the recovery of damages for an alleged breach of a contract by the defendants, through their officers, in not furnishing to the claimant, but giving to another, certain transportation of military stores and supplies, which he claims it was his right under the contract to have had given to him; and the amount claimed is the difference between the price stipulated to be paid for the service and what it would have cost the claimant to perform the service if he had been called upon by the Government to do so. It belongs, therefore, to the class of speculative suits—of which I have observed several in this court—a kind of case which, I confess, does not at any time engage my most favorable regard.

The decision of the case turns upon the construction of three words in the contract, namely, "posts, depots, and stations." If the construction given to those words by the majority of the court be correct, the claimant is entitled to a recovery; otherwise not. It is my misfortune not to concur in that construction, for reasons which I will now proceed to state.

I agree with the majority in regard to the region or district covered by the contract in question; which, by general boundaries, may be stated as lying between the fortieth and forty-fourth degrees of north latitude, and the Missouri River and the one hundred and fourteenth degree of longitude west of Greenwich. Within that region or district the claimant was bound to transport stores and supplies for the Government, from and to the points named in the contract; and it is not alleged that from any point so named any transportation was given to another; and therefore no damages are demanded on that account.

The claim grows out of Article 2 of the contract, which is in the following words:

"Article 2. That the said Alexander Caldwell agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts, depots, or stations named in Article I, or from or to any other posts, depots, or stations that may be established within the district named in said article, any number of pounds of military stores and supplies, from and between one hundred thousand pounds and ten millions of pounds, in the aggregate."

The claim rests, first, upon transportation which the Government caused to be performed by the Union Pacific Railroad between Omaha, Nebraska, and three successive western termini of that road, namely, Columbus, Lone Tree, and Kearney Station; and, secondly, upon wagon transportation from those termini westward, which the Government furnished by contract to one Herman Kountze, and which the claimant contends should have been furnished to himself.

On the first of those grounds, I can see no possible right of action in the claimant; for Omaha was not a point named in the contract, nor was it established as a post, depot, or station of any kind, military or other, after the formation of the contract. On the contrary, it was, at the date of the contract, the military headquarters of the Department

of the Platte, and therefore a military post; and that it was not
.32 named in the contract as a point from or to which the claimant was to transport stores or supplies, is simply conclusive against his obligation to receive any there, or his right to demand transportation from that point.

If anything were wanting to make it more so, it is found in the fact that, at the date of the contract, the Union Pacific Railroad was in operation from Omaha westwardly, about sixty miles, and soon thereafter was put in operation, successively, to Columbus, Lone Tree, and Kearney Station; distant respectively, from Omaha, ninety two, one hundred and thirty-two, and one hundred and ninety-one miles. To me it is simply inconceivable that any officer of the Quartermaster's Department of the United States Army would contract for wagon transportation alongside of a railroad; particularly with a stipulation, such as this contract contains, that ten days per hundred miles for mule-trains, and fourteen days per hundred miles for ox-trains, should be deemed sufficient speed; thus going no farther in a day than a railroad train would go in thirty to forty minutes. The absurdity of mulcting the Government in damages upon the assumption that this contract authorized wagon transportation alongside of the Union Pacific Railroad was so plain, that, though damages are claimed in the petition on account of the transportation of stores and supplies by railroad from Omaha to Columbus, that claim was not specified in the brief of claimant's counsel; an omission which I do not consider cured by any oral claim made by the counsel who argued the case. This omission of that item of claim from the brief is the final and incontrovertible evidence that that part of the claim was intended to be abandoned here; for Rule XXX of this court declares that "all items of claim not specified in the brief shall be considered as waived." When, therefore, the able counsel who prepared the brief in this case, "specified" therein, in exact terms, the "items of claim" on account of transportation from Columbus, Lone Tree, and Kearney Station, and did not specify any item of claim on account of transportation from Omaha, we are required by our own rule to consider that omitted item as "waived," and wholly withdrawn from the case.

It is in connection with the other ground of the claim that the construction of the words posts, depots, and stations becomes decisive of the case. I concur in the ruling of the majority, under the authority of the Supreme Court in United States vs. Speed, (8 Wallace, 77,) that the obligation imposed upon the claimant to transport stores and supplies from and to certain points, imposed a correlative obligation on the Government to deliver to him for transportation all the stores and supplies, not exceeding ten millions of pounds in the aggregate, which, during the period specified in the contract, were required to be transported by wagons from and to those points; except such as the Government might see fit to carry by its own means of transportation; the right to use which was expressly reserved in Article 11 of the contract.

The question then is, whether the Government violated that obligation by delivering, as it did, to Kountze, at Columbus, Lone Tree, and Kearney Station, stores and supplies to be transported by wagons to forts or military posts situated in the region or district covered by this contract.

As neither Columbus, Lone Tree, nor Kearney Station is named in the contract, such violation is not chargeable, unless those places are included in the words "any other posts, depots, or stations that may be established within the district named in said Article 1." If so included the claimant has a good cause of action; otherwise, not.

Without controversy, neither of those places was, in any sense, at any time a military post, depot, or station; but each of them, as reached
33 by the Union Pacific Railroad, in the progress of its construction westwardly, became a railroad depot or station, from which stores and supplies were delivered by the Government to Kountze for transportation by wagons to military posts "within the district named in in said Article 1." Was this a violation of claimant's contract? Let us see.

It will be observed that in Article 2, the words "posts, depots, or stations" occur twice in immediate connection. The claimant there binds himself "to transport * * * from the posts, depots, or stations named in Article 1, or from and to any other posts, depots, or stations that may be established within the district named in said article * * military stores and supplies."

Every recognized rule of interpretation of written instruments requires that the words "posts, depots, or stations" should be considered as used in the same sense in both places. It is a violent distortion to give them one meaning in one line, and a different meaning in the next line, when there is no word indicating an intention to enlarge, contract, or in any way change the meaning. When, therefore, we ascertain what kind of posts, depots, or stations was meant in Article 1, we know what kind was meant in Article 2.

That those named in Article 1 were simply and only military posts, depots, or stations of the Government, would seem to be incapable of dispute or doubt. Every point there named is a fort; and when, in that connection, "posts or depots" to be thereafter established are mentioned, it could hardly be supposed possible that any other than military posts or depots of the Government could have been intended—particularly when, whether at the forts named, or at the posts or depots to be thereafter established, the only subject of transportation by the claimant, under the contract, was military stores and supplies, to be delivered to him, and received from him, by officers or agents of the Quartermaster's Department of the Army.

And furthermore: By whom, or by what authority were those "other posts, depots, or stations" to be "established?" Manifestly, as the posts, depots, and stations named in the contract had been established by the United States, so it could only have been intended to refer to others which the United States might thereafter establish, and from and to which transportation of military stores and supplies would be necessary. It would seem quite impossible that either party to the contract could have intended to base future obligations, as between themselves, upon what might thereafter be done by others in the way of establishing, within the district in question, what those others, or people generally, might choose to call a post, a depot, or a station. Neither officers of the Government nor contractors could, without plain words to that effect, be held to have designed that the acts of outside parties, over whom neither could exert any control, should come to form a part of a contract with which those parties had no connection, and of which, most probably, they would have no knowledge.

The views I have thus expressed lead me to the conclusion that the claimant's case is singularly destitute of merit, and ought to be dismissed. But, were it otherwise, I could not concur in the amount awarded, which is the entire difference between the cost of rendering the service (if the claimant had been called upon to render it) and what he would have been entitled by the terms of the contract to receive for the service. In Speed's case, (2 Ct. Cls. R., 429, and 8 Wallace, 77,) this

court, and afterwards the Supreme Court, laid down the rule of damages in such cases to be "the difference between the cost of doing the work and what the claimant was to receive for it, making rea-
34 sonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." As no such deduction is made in this case, I could not concur in a judgment which disregards our own rule of damages, approved and affirmed by the appellate court.

35 U. S. Court of Claims, December term, 1871.

ALEXANDER CALDWELL
vs. } 6190.
THE UNITED STATES.

The petitioner, by his counsel, Thomas J. Durant, before the hearing of the cause, respectfully requests the honorable court to find specifically as to the following facts, viz:

First. That the contract as set forth in the petition was entered into between the claimant and the defendant on the day and date set forth, viz, 12th March, 1866.

Second. That the claimant, as soon as the said contract was entered into, prepared himself to carry out and perform the same fully on his part, and of this the defendant had notice.

36 Third. That the defendant, without notifying the claimant and after the defendant had notice that the claimant was prepared to carry out and perform the said contract, and (before the claimant was called upon to transport any supplies under said contract) entered into two separate contracts with one Herman Kountze, one of which contracts was dated on the sixth, and the other on the eleventh of June, 1866, for carrying military stores and supplies, by wagons and teams, of the said Herman Kountze, over the same route, and in the same region, and for the same destination and purposes, as are set forth in the contract sued upon; and that under said contract with Herman Kountze, the defendants, their officers and agents during the year 1866, and the time covered by the contract sued upon, did turn over to the said Herman Kountze four million three hundred and forty-seven
37 thousand pounds of such military stores and supplies as are described in the contract sued upon, and which were by the said Kountze transported in his wagons under his said contract.

Fourth. That the supplies forwarded by the defendant under contract with Herman Kountze, were forwarded to supply the same posts, depots, and stations as were to be furnished by forwarding supplies under the claimant's said contract, and that they were forwarded originally by defendants from a depot on the west bank of the Missouri River, north of Fort Leavenworth, and south of latitude 42 degrees north.

Fifth. That the claimant offered before the defendant forwarded the said supplies from said depot, to receive the same, for transporta-
38 tion on said route, at said depot, whenever they were ready to be forwarded, and that said offer was refused. That the claimant thereupon, and before the same or any part of the same had been forwarded from said depot, offered to receive the same for transportation on said route whenever they should be ready for delivery to him, at any point or points upon the Union Pacific Railroad, then in process of construction west of said depot, and within the district described by Article I, of claimant's said contract, and that this offer of the claimant was also refused.

Sixth. That the supplies forwarded under the Kountze contract were forwarded from Columbus, Lone Tree, and Kearney Stations, which places were depots during the continuance of claimant's contract and within the district described in said contract, for supplying by
39 forwarding upon wagons by contract on route one, the posts, depots, and stations included within claimants said contract.

Seventh. That the amount of supplies transported over route one, as described by claimant's contract, under the Kountze contract, and the distances the same were transported, are as follows, viz:

40 Pounds of supplies transported.	Place of departure.	Place of delivery.	Distance travelled.
89,007.....	Lone Tree, Nebraska.....	Fort Laramie	448
484,037.....	Columbus, do.	Fort Reno & beyond.....	670
423,425.....	Fort Kearney, do.	Fort Laramie	480
618,043.....	Lone Tree, do.	Fort Reno & beyond.....	634
1,167,595.....	Columbus, do.	Fort Laramie.....	486
406,908.....	Fort Kearney, do.	Fort McPherson.....	101
985,969.....	Lone Tree, do.	Fort McPherson.....	170
171,946.....	Columbus, do.	Fort McPherson.....	215

Eighth. That the claimant was prepared to transport all the supplies carried under the Kountze contract, at a cost to himself of one dollar and twenty cents ($1.20) per hundred pounds per hundred miles.

Ninth. That, had the military stores and supplies turned over to Kountze been delivered to petitioner, he would have made a profit on their transportation of $65,190.

THOMAS J. DURANT,
For Petitioner.

Filed December 10, 1872.

40½ Upon the foregoing proposed findings by the claimant, the court makes the following order, to wit:

Disallowed, because stated in the facts found by the court.

41 United States Court of Claims. December term, 1871.

ALEXANDER CALDWELL
vs.
THE UNITED STATES. } No. 6190.

And now comes the defendants, by the Attorney-General, and requests that the honorable court make finding of the following facts, viz:

1. That a voucher for transportation of military stores on route No. 1, under the contract of March 12, 1866, for $15,919.73, was given on August 21, 1867, to the claimant, by Capt. I. H. Belcher, A. Q. M., and he receipted in full thereon.

2. That the Third Auditor certifies to the fact that this voucher
42 was the final payment made on the contract of March 12, 1866.

3. That this voucher was given subsequent to the alleged breach of contract set up by the claimant.

4. That no protest, or any other claim not specified in the voucher, was made when the receipt in full was given.

5. That it was a final settlement on the contract of March 12th, 1866, a breach of which is alleged.

6. That Lone Tree, Kearney Station, and Columbus were the progressive termini of the Union Pacific Railroad.

7. That no military force was at either of these points, but only a few laborers.

8. That Lone Tree, Kearney Station, and Columbus were not
43 posts, depots, or stations within the meaning of the contract of March 12th, 1866, made with the claimants.

9. That at the time of the making of the contract of March 12th, 1866, the claimants refused to take Government supplies from the termini of the Union Pacific Railroad.

10. That it was mutually understood by the claimant and defendant at the time of the making of the same that the contract of March 12th, 1866, did not include the termini of the Union Pacific R. R.

11. That subsequent to the execution and delivery of the contract of March 12th, 1866, with Government, that the claimants made contracts for the transportation of at least one-half of the supplies mentioned in said contracts of March 12th, 1866, with different parties, in the words and figures following:

44 It is hereby agreed, by and between Harvey Spalding, of Lawrence, K's, of the first part, and Alexander Caldwell, David K. Jackman, James Duffy, Thomas A. Scott, James L. Reynolds, and Leonard T. Smith, parties doing business under the firm-name of A. Caldwell and Co., of Leavenworth, Kansas, parties of the second part, as follows, namely:

The said party of the first part hereby agree' and bind' himself, heirs, executors, and administrators, to transport in good and condition, from Fort Leavenworth, K's, to Great Salt Lake City, Utah, seventy-five thousand pounds of such military stores as may be offered to or turned over to the said parties of the second part for transportation by the depot quartermaster at Fort Leavenworth. Provided always, and it is hereby agreed by and between the said parties to this agreement, that if the said depot quartermaster shall fail to offer or turn over
45 to the said parties of the second part the amount of said stores as above specified, or any part or portion thereof, for transportation as above stated, the said parties of the second part shall not be bound to furnish to the said part' of the first part any other stores in lieu thereof.

And it is further agreed, by and between said parties, that the said party of the first part shall ship said stores on or before the 5th day of July, 1865, (provided the quartermaster shall deliver them to the parties of the second part by that time,) or as soon thereafter as they may be ready for shipment and delivered to the parties of the second part, and shall transport the same with all practicable dispatch to their destination. The said party of the first part hereby assuming all the risks and obligations of H. S. Buckley, under his
46 contract with the United States, dated March 21st, 1865, and of the parties of the second part, in reference to the transportation and delivery of said stores at the point of destination.

For and in consideration of the faithful performance of this agreement by the said part' of the first part, the said parties of the second part agree to pay to the said part' of the first , at the rate of twenty-one dollars per 100 lbs., delivered at Salt Lake, payment to be made after the delivery of the stores and upon the return to the parties of the second of the bill of lading properly receipted by the officer or

agent of the United States receiving the stores at the point of destination.

Witness our hands and seals this 22ond day of June, 1865.

(Signed) HARVEY SPALDING.
A. CALDWELL AND CO.

Witness:
W. H. CASSON.

47 Except the necessary changes in names of contractors, dates, amounts, and places of receipt and delivery, and that said stores were transported by said persons so contracted with by said claimants.

12. That no tender of transportation at Kearney Station, Lone Tree, or Columbus was made on the part of the claimant to any Government officer or agent at the time it is alleged transportation of Government stores was given to Herman Kountze, nor has any proof been furnished that the claimant was prepared, with teams and wagons, at Kearney Station, Lone Tree, or Columbus to transport the whole or any part of Government stores alleged to have been transported from said points by Herman Kountze.

13. There is no evidence from which the amount of damage alleged to have been suffered by the claimant can be estimated. There is
48 no proof as to what the cost to the claimant would have been of transportation from the termini of the Union Pacific Railroad. No actual damage to the claimant is shown.

14. In the contracts with Herman Kountze, dated June 6 and June 11, 1866, the words "termini of the Pacific Railroad," occur, but none such appear in the contract under which this suit is brought.

WILLIAM McMICHAEL,
Assistant Attorney-General.

Filed Dec. 11, 1872.

Upon the foregoing proposed findings by the defendants, the court makes the following order, to wit:

Disallowed, because, so far as admissible, stated in the findings of the court.

49 Court of Claims of the United States, December term, 1872.

ALEXANDER CALDWELL
vs.
THE UNITED STATES. } No. 6190.

And now come the defendants, and request the court to further certify and find that the deposition of Alexander Bliss was duly taken by and on behalf of the defendants, was duly filed, and formed a part of the record of this cause, and were in the words and figures following, viz:

50 In the Court of Claims of the United States.

Deposition of Alexander Bliss for defendants, taken at Berlin, Prussia, October 28, 1871.

ALEXANDER CALDWELL
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THE UNITED STATES. } No. 6190.

I hereby certify that on the twenty-eighth day of October, 1871.

Alexander Bliss, the witness in the annexed interrogatories named, appeared before me in person, in Berlin, Prussia, and, after being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth relative to said cause, I propounded to him the several annexed interrogatories and cross-interrogatories, to which he made answers severally, which answers were taken down by me, or in my presence, and by my direction, and were duly signed by said witness, and are hereto annexed, and were so signed by said witness in my presence after having been read over to him; that said interrogatories and cross-interrogatories were propounded to said witness in their order, and the answers taken down as nearly as practicable in the precise words of the witness; and that while said deposition was being taken no other person was present than the witness, myself, and the person employed by me to write down the answers of the witness.

The last interrogatory was not propounded to the witness until the close of the examination.

[CONSULATE SEAL.]

H. KREISMANN,
Consul of the United States of America,
at the City of Berlin, in the Kingdom of Prussia.

Court of Claims.

ALEXANDER CALDWELL
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THE UNITED STATES. } No. 6190.

It is hereby stipulated that the annexed interrogatories and cross-interrogatories may be propounded to Alexander Bliss, the witness on the part of the defendants therein named, and his answers thereto under oath, taken by the United States consul or vice-consul, at Berlin, Prussia; and said deposition, when so taken and filed with the clerk of this court, may be used and read in evidence on the trial of this cause with the same force and effect as if taken by commission regularly issued, reserving all exceptions and objections to the said interrogatories and the answers thereto.

September 15, 1871.

THOMAS H. TALBOT,
Assistant Attorney-General.
C. F. PECK,
Solicitor for Claimant.

51 United States Court of Claims.

ALEXANDER CALDWELL
vs.
THE UNITED STATES. } No. 6190.

Interrogatories to be propounded on behalf of the defendants, to Alexander Bliss, the evidence to be used on the trial of this cause.

Interrogatory 1. Please state your name, occupation, age, place of residence the past year; whether you have any interest, direct, or indirect, in the claim which is the subject of inquiry; and whether and in what degree you are related to claimant.

Interrogatory 2. What was your occupation in 1866; and if in the military service of the Government, where was your station, and what your duties during that year?

Interrogatory 3. Did you, during the spring of that year, execute on the part of the Government, with Alexander Caldwell, the claimant, a contract for the transportation of Government stores on route No. 1, (so called,) of which Exhibit A, hereto annexed, purports to be a copy?

Interrogatory 4. Previous to the execution of the contract, did Mr. Caldwell have an interview with the Quartermaster-General and yourself, and one Z. W. Denham, or either of them, and who, with reference to the transportation of stores from the progressive termini of the railroads?

Interrogatory 5. State what, if anything, was said as to the information of the Quartermaster-General that the railroads would be in condition that season to transport Government stores for some distances; what objection, if any, Mr. Caldwell made to taking any stores from the progressive termini of the railroad, and whether or not he refused to do so, and the reasons given for his objections, if any. State fully.

Interrogatory 6. At or about the time of the execution of the contract, what was said, if anything, as to the intention of the Quartermaster-General to make use of the railroads in the transportation of Government stores that season, in the presence and hearing of Mr. Caldwell?

Interrogatory 7. How was the contract originally drawn with reference to requiring Mr. Caldwell to transport stores from the progressive termini of the railroads, and if there was such a clause, was it or not afterward stricken out, and at whose request, if any one, or how otherwise, and is that original draft now in existence; and, if so, where is it, or where was it when you last saw or knew of it?

Last interrogatory. Do you know of any other matter relative to the claim in question? If you do, state it.

T. H. TALBOT,
Assistant Attorney-General.

The claimant, by his solicitor, objects to the 4th, 5th, and 6th direct interrogatories, calling for oral evidence of conversations and statements of parties to the contract and strangers, all of which were merged in and concluded by the contract itself, and as seeking to control or construe a written agreement by neutral statements. He also objects to
52 the 7th direct interrogatory for the reasons above stated, and because it seeks to introduce evidence of written documents which were merged in and concluded by the contract finally signed, and also seeks to prove the contents of such written instrument by oral evidence.

Cross-interrogatories to be propounded to Alexander Bliss:

Cross-interrogatory 1. If in answer to the direct interrogatories you have recounted any conversations, please state whether your evidence refers to more than one conversation.

Cross-interrogatory 2. If you have answered the above interrogatory in the affirmative, state how many conversations you refer to.

Cross-interrogatory 3. State who was present at each of said conversations.

Cross-interrogatory 4. State whether you made any memorandum or notes of such conversations or any of them.

Cross-interrogatory 5. If you have answered the fourth cross-inter-

rogatory in the affirmative, state whether you had the memorandum or notes before you in giving your testimony, or when you last examined them.

Cross-interrogatory 6. State when each memorandum was made, and by whom. Give the precise date, if you can.

Cross-interrogatory 7. If you have recently perused or had before you any memorandum, letter, or document which has refreshed your recollection in regard to any of the matters you have testified to, state when such memorandum, letter, or document was written, or purports to have been written, and by whom.

Cross-interrogatory 8. State whether you have given all that was said at each of the conversations referred to in your direct examination. If you have not done so, state in reply to this interrogatory all of such conversations which you had omitted.

C. F. PECK,
Solicitor for Claimant.

ALEXANDER BLISS, being duly sworn, deposes as follows:

Answer to interrogatory 1. My name is Alexander Bliss; secretary of legation; over 21 years of age; Berlin; have no interest whatsoever in the present claim, and am not related to claimant.

Answer to interrogatory 2. In 1866 I was quartermaster in the United States Army, stationed at Washington, and on duty as chief of the fourth division in the Quartermaster General's office, which division was that of army transportation.

Answer to interrogatory 3. I did.

Answer to interrogatory 4. Mr. Caldwell had an interview with the Quartermaster-General and with me on the subject. Whether Mr. Denham was present or not, I do not now recollect.

Answer to interrogatory 5. It was stated to Mr. Caldwell by the Quartermaster-General and by myself, that the office had been
53 officially informed that the two lines of the Pacific Railroad would, in the course of the ensuing summer, be ready, for some distance each, to transport Government stores, and that the Quartermaster-General, therefore, felt bound to avail himself, as far as it could be used, of this cheaper method; that the contract had therefore been framed accordingly, that is to say, it fixed, as the points of departure for wagon transportation, the western termini, for the time being, on the two lines of railroad. Mr. Caldwell objected to taking the contract under these circumstances. The grounds of his objection were, that the termini would be perhaps changeable—certainly new points—unprovided with facilities for the shelter either of the stores after delivery to him, or of the contractor's animals, teamsters, supplies, &c. Mr. Caldwell sought to dissuade the Department from making any change that season. He said the roads, even if nominally ready, would not be in serviceable running order; that the transshipment and protection of the stores would cost more than what would be saved. But the Department adhered to its purpose of using the railroad as far as it could, and Mr. Caldwell was so informed by the Quartermaster-General and by me. Mr. Caldwell thereupon refused to enter into the contract on these terms.

Answer to interrogatory 6. Before the execution of the contract which was made with Mr. Caldwell, and of which the starting-points were, as he desired, on the Missouri River, and at the time of the execution of said contract, he was told that the Department would make

use of the railroads, as far as it could, in transporting Government stores that season.

Answer to interrogatory 7. The contract was originally drawn, as well as I remember, fixing, as the points of departure, such points on the railroad as should be designated, or as the railroad should be completed to, or some such phraseology. This clause was afterwards changed, and in consequence of the refusal, as above stated, of Mr. Caldwell, so as to fix, as the points of departure, places only on the Missouri River, as had been usual in the contracts of previous years. I cannot say whether the original draft was kept, nor where it now is. If in existence, it should be among the archives of the fourth division, Quartermaster-General's Office. I took away no official papers. I doubt if a draft would have been kept.

ALEXANDER BLISS.

Sworn to and subscribed before me this twenty-eighth day of October, A. D. 1871.

[CONSULATE SEAL.] H. KREISMANN,
Consul of the United States of America
at the City of Berlin, in the Kingdom of Prussia.

Alexander Bliss, being duly sworn, deposes as follows:

Answer to firs tcross-interrogatory. It does.

Answer to second cross-interrogatory. I refer to two.

Answer to third cross-interrogatory. At one the Quartermaster-General and myself were present, in the room of the former. It is highly probable that Mr. Denham was at his desk in the same room, but I cannot say. The second conversation was in my room. I think it highly probable that others may have been present, but I remember only Mr. Caldwell and myself.

54 Answer to cross-interrogatory four. I made none.

Answer to cross-interrogatories five and six. (No answers.)

Answer to cross-interrogatory seven. I have had before me recently no memorandum, letter, or document which has refreshed my memory.

Answer to cross-interrogatory eight. I have stated the main tenor of the conversations as I remember them. I have intentionally withheld nothing. I think of nothing which I have omitted, and cannot therefore state such.

Reply to last direct interrogatory. What I know of the claim in question is, in a few words, this: That Mr. Caldwell, in my presence, refused to contract to take stores for the year 1866 from the then western termini of the Union Pacific Railroad; that contract was made with him to take stores from the Missouri River; that when he made that contract Mr. Caldwell was informed and was well aware that the Quarmaster's Department would forward such stores as it found practicable and advantageous to the termini of the railroad, to be thence further transported either by Government wagon-trains or by contractors who might offer to take them; that there was no obligation to give to Mr. Caldwell the preference or the refusal of such wagon transportation from the western termini of the railroad.

ALEXANDER BLISS.

Sworn to and subscribed before me this twenty-eighth day of October, A. D. 1871.

[CONSULATE SEAL.]

H. KREISMANN,
Consul of the United States of America at the City of Berlin, in the Kingdom of Prussia.

(Endorsed:) No. 6190. United States Court of Claims. Alexander Caldwell vs. The United States. Deposition of Alexander Bliss, taken before me at the city of Berlin, in the Kingdom of Prussia, on the twenty-eighth day of October, A. D. 1871. H. Kreismann, United States consul. Filed November 17, 1871. J. R.

55 And that at the commencement of the trial of said cause the counsel for the claimant moved to strike out the evidence of said Bliss from said record as incompetent, by reasons of the statements having been made previous to the execution of the contract, and were therefore merged in the contract, which motion was opposed by the counsel for the Government, but the same was granted by the court, and said deposition was stricken out.

WILLIAM McMICHAEL,
Ass't Att'y-Gen'l.

Filed March 10, 1873.

Upon the foregoing proposed findings by the defendants, the court makes the following order, to wit:

Disallowed, as evidence cannot be sent to the Supreme Court under its rules; the facts stated are stated by the court.

56 In the Court of Claims.

ALEXANDER CALDWELL
vs.
THE UNITED STATES. } No. 6190.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General for the allowance of an appeal, as filed in the clerk's office July 5, 1873, and of the order of the chief justice of said court allowing the same; of the application for an appeal by the claimant, filed July 11, 1873, and of the order allowing same; of the findings of fact by the court, & the conclusion of law thereon; of the opinion of the court; of the proposed findings by the claimant & defendants, and the order of the court indorsed on the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this third day *day* of November, 1873.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 637. The United States, appellants, vs. Alexander Caldwell; and No. 638, Alexander Caldwell, appellant, vs. The United States. Cross-appeal. Court of Claims. Filed 6 November, 1873.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, APPELLANTS,
vs.
ALEXANDER CALDWELL. } No. 637.

ALEXANDER CALDWELL, APPELLANT,
vs.
THE UNITED STATES. } No. 638.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, APPELLANTS, *vs.* ALEXANDER CALDWELL. } No. 637.

ALEXANDER CALDWELL, APPELLANT, *vs.* THE UNITED STATES. } No. 638.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The claimant executed a contract with Colonel Bliss, an assistant quartermaster in the Army, on the 12th of March, 1866, which is printed in full in the record, pp. 2, *et seq.*, the material parts of which are as follows:

"ARTICLE I. That the said Alexander Caldwell shall receive at any time, in any of the months from April to September, inclusive, during the year one thousand eight hundred and sixty-six, from the officers or agents of the Quartermaster's Department at Forts Leavenworth and Riley, in Kansas; at Fort Kearney, Nebraska Territory; Fort Sedgwick, Colorado Territory; Fort Laramie, Dakota Territory, and at any points or places at which posts or depots shall be established during the continuance of this contract, on the west bank of the Missouri

River north of Fort Leavenworth and south of latitude 42 degrees north, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition, by the officer or agent of the Quartermaster's Department, at any or all of the above points or places, and transport the same with dispatch; and deliver them in like good order and condition, to the officer or agent of the Quartermaster's Department on duty or designated to receive them, at any of the posts or depots which are now or may be hereafter established in the Territory of Colorado, north of 40 degrees north, and at Denver City, and in the Territories of Nebraska, Dakota, Idaho, and Utah, south of latitude 44 degrees north, including Fort Reno, and east of longitude 114 degrees west of Greenwich, agreeably to the instructions he may receive from the officer or other authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies at Fort Leavenworth or other place of departure; and for the faithful performance of such service he shall be paid in the manner hereinafter provided for in Article 15 of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

"ARTICLE II. That the said Alexander Caldwell agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts, depots, or stations named in Article I, or from and to any other posts, depots, or stations that may be established within the district named in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and ten millions of pounds in the aggregate."

"ARTICLE XI. That the said Alexander Caldwell shall transport all the military stores and supplies for which the Quartermaster's Department may require wagon-transportation by contract on the route specified by this agreement, during the year one thousand eight hundred and sixty-six, provided the weight of such military stores and supplies shall not exceed, in the aggregate, ten mil-

lions of pounds, yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service whenever it may be deemed advisable to do so."

The contract was for route No. 1, and extended over a district bounded easterly by the east bank of the Missouri River; northerly by the 42nd degree of north latitude; westerly by the 114th degree of west longitude, and southerly by the 44th degree of north latitude, and included Fort Reno. At the date of the contract the only military posts on the west bank of the Missouri River within the said district were Fort Leavenworth, in Kansas, and Omaha, in Nebraska.

On or before the 30th of March, 1866, the President of the Union Pacific Railroad advised the Quartermaster-General that the company had sixty miles of their line completed west of Omaha, and that the company expected to complete the first hundred miles by the 10th of June. In the summer and autumn of 1866, the Union Pacific Railroad had extended their line westward to Columbus, Lone Tree, and Kearney's Station, and it offered to the United States a more expeditious and cheaper mode of transportation than wagon-transportation. In the summer of 1866, the United States had collected at Omaha, military stores and supplies intended for the supply of posts west of the Missouri River, and within the district covered by the contract with the claimant, and in the year 1866, they sent by railroad, quantities of said stores and supplies from Omaha to Columbus, Lone Tree, and Kearney's Station, the successive termini of the railroad as it was extended westward, as is set forth in the schedule hereto annexed, marked No. 1. (Rec., p. 11.)

In the month of June, 1866, the United States contracted with Herman Kountze for the transportation of said stores and supplies from Columbus, Lone Tree, and Kearney's Station to Fort McPherson, Fort Laramie, and Fort Kearney on said route No. 1, and copies of said contract are hereto annexed and marked B and C. (Rec., pp. 12 and 14.) And thereafter Kountze, under

the said contracts made with him, performed the transportation specified in the schedule marked No. 2. (Rec., p. 11.)

Before the delivery of the said military stores and supplies to the said railroad, and before the making of the said contracts with Kountze, the claimant was prepared, and notified the Government of his readiness, to transport the said supplies under and according to his contract, and before the delivery of said military stores and supplies to the said Kountze, but after the making of said contracts with him, he claimed the right, under his contract to transport the said military stores and supplies from the termini of said railroad to such places, within his contract, as the United States might designate.

No notice was given by the United States to the claimant to transport the stores and supplies transported by said Kountze. But on the 11th of June, 1866, the claimant was notified by the United States that transportation under his contract, would not be needed.

At the hearing of the case in the Court of Claims, the Government offered evidence to prove—

1. That, before the contract with the claimant was made, the United States proposed to him that the contract should make provision for the delivery to him, for transportation of military stores and supplies at points on the railroad as that should be completed; and that the claimant objected to said provision, and it was not made.

2. That, at the execution of said contract with the claimant, he was informed by the officers of the Quartermaster's Department, that it would use the railroad for such transportation as far as it could.

The evidence was rejected.

The court found, as conclusion of law, that, by the legal intendment of the contract made between the United States and the claimant, he was entitled to the transportation of all the military stores and supplies sent by them in the months of April to September, inclusive, in the year 1867, [1866?] from Omaha to the places within the district described in the contract, and

that the United States by delivering such military stores and supplies in said months to the Union Pacific Railroad and Herman Kountze, committed a breach of the contract.

ASSIGNMENT OF ERRORS.

The United States assign as errors—

I. That there was no implied covenant on the part of the United States to employ the claimant to transport the supplies that they would require transportation for on the route named.

II. That, from the entire contract, it is evident that the transportation required was wagon transportation, and, consequently, that the contract does not apply to transportation along the line of the railway.

III. That the contract does not entitle the claimant to the transportation of the supplies sent from Omaha.

IV. That the stations on the Union Pacific Railroad were not military posts and depots within the meaning of the contract; and

V. That the parol evidence offered was admissible in order to show to what the contract was intended to apply.

ARGUMENT.

1. The subject-matter of this contract is the transportation of military stores and supplies between different military posts, and in such a contract it is submitted there can be no covenant implied to employ a contractor rather than anybody else. Whether such a covenant is implied in a contract depends, in part, upon the subject-matter of it. In the case of the *United States* vs. *Speed*, 8 Wallace, 77, which was a contract for the slaughtering, curing, and packing, of pork, it was decided that a corresponding obligation was implied to furnish the hogs necessary for the performance of the contract by the contractor. But the court

did not profess there to enter into any general discussion of the doctrine of the implication of mutual covenants (see p. 84) and that contract was widely different in character from a contract for the transportation of military supplies. If a covenant to employ a contractor can be implied in this case, it could be implied in a contract like this in time of war, and the Government would be obliged to pay damages for breach of the implied covenant, even if military necessity required some other route. This brings the case within that of *Churchward* vs. *The Queen*, 6 B. & S., 807; *S. C.*, Law Rep., 1 Q. B. 173, which was a contract for the transportation of the mail between Dover and Calais. (See the latter book, pp. 195, 196.) This whole subject is also discussed in *Emmens* vs. *Elderton*, 4 H. L. Cas., 624, and in the notes to *Pordage* vs. *Cole*, 1 Wms. Saund., 319, *l.*, where the authorities are all collected.

II. It appears by the findings of the court that simultaneously with the execution of this contract, sixty miles of the Union Pacific Railroad established by Congress, partly as a military road, was open and in operation. Now, it is apparent from the entire contract, repeated reference being made to wagon-trains, etc., as well as from the geographical facts of which the court will take judicial notice, that Caldwell's contract was for wagon-transportation. And this being so, it is not to be presumed that the Government would make a contract with him to transport military stores by wagon along the route covered by a railway. If it were intended that Caldwell should act the part of an expressman and simply transport the goods of the Government along the railway, reference to that fact would be made in the contract. The contract, therefore, being one solely for the transportation by means of wagons, the question recurs, to what was it intended to apply? and the answer to that is transportation which would require to be performed by wagons, and not to the transportation that could be performed by railway.

III. Caldwell was to receive, by article first of the contract, such military stores and supplies as might be offered or turned over to him for transportation by "the officers or agents of the Quartermaster's Department at Forts Leavenworth and Riley, in Kansas; at Fort Kearney, Nebraska Territory; Fort Sedgwick, Colorado Territory; Fort Laramie, Dakota Territory; and at any points or places at which posts or depots shall be established during the continuance of this contract on the west bank of the Missouri River," etc. Now, at the date of the contract, the court finds it as a fact that the only military posts west of the Missouri River were Fort Leavenworth, in Kansas, and Omaha, in Nebraska. If Omaha was included in the contract, being as it was then the headquarters of the Army in that department, and therefore one that could not well have been out of the minds of the contracting parties, why was a place of so much importance not named? Instead of this, however, while two places in Kansas are named, and one place in Nebraska, Omaha, the chief military post of all, is entirely omitted. And we respectfully submit that, under the maxim, *expressio unius est exclusio alterius*, the court must presume that it was purposely excluded. It is not expressly named, and it cannot be included in the words "points or places at which posts or depots shall be established during the continuance of this contract," for they evidently refer to posts or depots thereafter to be established, and not to those already existing.

The legitimate conclusion is that Omaha was omitted intentionally, and because the contractors did not intend to include transportation from that place within the contract. And this is greatly strengthened, if not rendered conclusive, by the fact that it was there that the Union Pacific Railroad began, and consequently it was not a post from which the Government would require transportation of military stores by wagon-trains.

IV. The posts and depots to which the contract refers are military posts and depots. This is demanded from the character of the posts named which are all forts, and construing the words "any points or places at which

posts or depots shall be established" by the maxim *noscitur a sociis*, it is contended that mere railway stations or depots on the line of railway were not the posts contemplated by the contract. Thus in Article I, the posts named are, the forts and the "points or places at which posts or depots shall be established." In Article II, the reference is "from the post, depots, or stations named in Article I," (that is from the forts,) "or from and to any other posts, depots, or stations that may be established;" and construing "any other" as *ejusdem generis*, it is clear that the posts, depots, or stations that were thereafter to be established, were regular military posts, and not mere stations on a railway, where Government supplies might be transshipped; and such seem to have been the posts upon the Union Pacific Railroad.

V. This appears from the parol testimony, which we submit was admissible in evidence. In the leading case of *Clayton* vs. *Lord Nugent*, 13 M. & W., 207, Baron Rolfe, (afterwards Lord Cranworth,) says: "Speaking philosophically, you must always look beyond the instrument itself, to some extent, to ascertain who is meant" in any written instrument or contract. "There may, indeed, be no difficulty in ascertaining who is meant when a person who has five or six names, and some of them unusual ones, is described in full; while, on the other hand, a devise simply to John Smith would necessarily create some uncertainty." This familiar principle is well stated by Mr. Justice Thomas in *Smith* vs. *Falkner*, 12 Gray, 255: "The question of intent is the question which always arises in the interpretation of a written contract. But that intention is to be found in the writing itself. If the words are unequivocal, they are the exclusive and conclusive evidence of what the parties intended. If their meaning is doubtful, you resort to extrinsic evidence, not to discover an intention outside the contract, nor to import an intention into it, but to enable you the better to read, understand, and interpret what is in the contract; the contract being none the less a written contract whose meaning is to be found in its words. This is the rule applicable not only to the interpretation and construction of simple con-

tracts, but of deeds and wills." See also *Bradley* vs. *Washington, Alexandria and Georgetown Steam-Packet Company*, 13 Pet., 389; Nelson, J., in *Salmon Falls Manufacturing Company* vs. *Goddard*, 14 How., 454; 2 Taylor on Evidence, 6th edition, 983, *et seq.*

The case falls within the third rule laid down by Mr. Justice Miller in *Phelps* vs. *Clasen*, Woolw. C. C. 212. "When the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible to show all the circumstances, such as the relation of the parties, their knowledge of the subject-matter of the contract, the state and condition thereof, and all other facts which shed any light on their intention or meaning."

The evidence set forth on p. 10 of the record, shows that, at the time the contract was executed, the claimant was informed by the officers of the Quartermaster's Department that it would use the railroad for such transportation as far as it could. The conduct of the military authorities throughout the time covered by the contract conforms to this understanding of the contract, but is not reconcilable with that taken by the court below.

Upon the appeal of the claimant, counsel does not desire to add anything to what is stated in the opinion of the court below, printed in the record, pp. 19, 20.

C. H. HILL,
Assistant Attorney-General.

IN THE HONORABLE THE

Supreme Court of the United States.

THE UNITED STATES, Appellants, *vs.* ALEXANDER CALDWELL.	*No.* 637.
Cross-Appeal. ALEXANDER CALDWELL, Appellant, *vs.* THE UNITED STATES.	*No.* 638.

Appeal from the Court of Claims.

Brief of Counsel of Alexander Caldwell.

On the 12th March, 1866, the Government contracted with Caldwell for the transportation of military stores and supplies from Forts Leavenworth, Kearney, Sedgwick, Laramie, and "any points and places at which posts or de-"pots should be established during the continuance of the "contract on the west bank of the Missouri river, north of "Fort Leavenworth and south of latitude 42° north." These military stores and supplies Caldwell bound himself to transport from the points just indicated to any of the

posts or depots which were at the date of the contract or which might subsequently be established in Colorado north of 40° north, at Denver City, and in Nebraska, Dakota, Idaho, and Utah, south of latitude 44° north, including Fort Reno, and east of longitude 114° west of Greenwich.

See Rec., p. 3.

The amount to be transported was any number of pounds from one hundred thousand to ten million.

Art. II, Rec., p. 3.

The art. XI of the contract (see page 6) declared "that "the said Alexander Caldwell should transport all the "military stores and supplies for which the Quartermas-"ter's Department might require wagon transportation by "contract, during the year 1866, not exceeding in the ag-"gregate ten million pounds."

The rates of compensation to be received for the service are found in the schedule referred to in the contract, and appended to it.

See Record, p. 7.

Caldwell made all his preparations of wagons, teams, men, provisions, forage, and whatever else was necessary for executing his part of the contract, and notified the quartermaster of such readiness.

The amount of transportation actually furnished Caldwell under his contract was 187,804 pounds, for which he was paid; no more was delivered to him, and the agents of the Government refused to give him more, and on 11th June, 1866, notified him that transportation under his contract would not be needed.

See Rec., p. 10.

However, during the time covered by Caldwell's contract, that is to say, in the months from April to September, inclusive, the Government sent, in the region covered by his contract and to points and places embraced in it, from Omaha, to Columbus, Lone Tree and Kearney Stations, 2,945,484 pounds.

See schedule No. 1, Rec. p. 11.

And during the time of Caldwell's contract the Government agents made another contract with one Kountze, for transportation of military stores and supplies in the region covered by Caldwell's contract, and between the same points which his contract embraced. The Kountze contract was made in June, 1866, (see Rec., p. 12 *et seq.*,) and he transported under it, 2,945,484 pounds, from April to September in that year, 1866, (see schedule No. 2, p. 11,) being the same supplies which the quartermaster had caused to be transported by railroad to the points where Kountze received them, and whence he transported them to the remote Western posts and places named in Caldwell's contract.

As far as the transportation thus described above is concerned, the court below was agreed with us, and allowed us damage for breach of contract for all the supplies given to Kountze at the points on the railroad, viz., Columbus, Lone Star, and Kearney Stations, in the months from April to September, but refused us damages for what the Government transported on the railroad to Omaha, and also for all that was given to Kountze under the latter's contract after September, to wit, in October, 1866.

The court below gave judgment in favor of Caldwell for $35,869.01.

From this judgment both parties have appealed.

ASSIGNMENT OF ERRORS.

Alexander Caldwell's counsel, on his appeal, assigns for error—

First. The court erred in refusing to allow petitioner for the profit he would have made on the amount of supplies transported by Kountze under his contract with Government in October, 1866, viz: from Omaha to Kearney's Station, 101 miles, 693,946 pounds, entailing a damage of $3,313.59; from Kearney's Station to Fort McPherson, 101 miles and 371,462 pounds, entailing a damage of $947.94; from Kearney's Station to Fort Laramie, 380 miles and 322,484 pounds, entailing a damage of $3,063.59, which makes in all—

1	$3,313 59
2	947 94
3	3,063 59
	$7,325 12

POINTS.

1. Caldwell's contract compelled him to prepare for, and hence gave him a right to have, all the transportation needed by the Quartermaster's Department, and for which, on the route and in the region covered by his contract, the Department might require wagon transportation.

See contract, art. XI, Rec., p. 6.

2. Caldwell's contract, moreover, declared that he was bound to take all such supplies just alluded to as required transportation during the year 1866.

Same article.

3. The expressions of the first article of the contract (Rec., p. 1) are interpreted by the court below so as to destroy all petitioner's rights under it, for if according to that interpretation the Quartermaster's Department should delay the shipment of supplies until the end of September, though having the whole ten million pounds spoken of in the contract on hand and ready to be shipped, then he would have no compensation for his expenditures in preparation and delay.

4. And if Caldwell had been called upon to perform transportation on the 1st October, how could he have been excused under a contract declaring him bound to transport during the whole year?

5. Omaha, where the Government stores were collected, is a point on the Missouri river, and therefore is included in the expressions of the first article of Caldwell's contract, which says he is to receive at certain places named, "and "at any points or places at which posts or depots shall be "established during the continuance of this contract on "the west bank of the Missouri river, north of Fort Leav-"enworth and south of latitude 42° north."

See contract, Rec. p. 3, lines 3, 4, 5.

6. And the contract bound Caldwell to deliver the supplies to be confided to him at various points and places, according to the instructions given him by any proper officer at Fort Leavenworth *or other place of departure.*

7. He was not to confine himself to the starting-places specially named in the contract, but was bound to receive supplies not only at those, but also "from and to any other "posts, depots, or stations that may be established within "the district named in article I." (See the contract, Rec.,

p. 3, article II, lines 4, 5, and 6; and article III, last clause.) Now the points at which the supplies were given to Koontz, viz., Columbus, Lone Tree, and Kearney, were precisely the posts, depots, and stations which the contract means, as they were within his region, and were established after the inception of the contract.

See Rec., p. 9, findings.

Respectfully submitted.

DURANT & HORNOR.
Attorneys for Claimant.

IN THE

Supreme Court of the United States.

THE UNITED STATES.
vs.
ALEXANDER CALDWELL.

Reply to Appellant's Points.

The contract was executed March 12, 1866. Sixty miles of railroad west of Omaha was completed March 30, 1866, eighteen days after the contract was made.

The extent of the route over the road travelled was more than 1,200 miles.

The only military *posts* established on the west bank of the Missouri river, at the time the contract was made, were Fort Leavenworth and Omaha. The latter place was a post, if military headquarters can be so designated. Fort Leavenworth had for years been a "depot" for supplying route one, and was named in the contract as a starting-point.

Omaha, although a military post, (headquarters,) was not established as a *depot* for this purpose till the summer of 1866. Both Omaha and Nebraska City were established as depots after the contract was made, both being on the west bank of the Missouri river, north of Fort Leavenworth and south of 42 degrees north latitude. Manifestly, places for shipment of 10,000,000 pounds of supplies to military posts, depots, and stations, and within a great district

abutting on a river as a base of supply might or might not be military posts or forts, depending on considerations of convenience, economy, and safety on the part of the Government.

The place agreed upon from which Kountz was to transport the supplies was Columbus, or some point or points between Columbus and Omaha, and *not* Columbus, Lone Tree, and Kearney Station. The dates of the Kountze contracts were June 9 and 11 respectively, thus showing that three months after the claimant's contract was executed the quartermaster at Omaha was still uncertain whether the railroad could be used as far as Columbus during the summer of 1866.

The first assignment of error is not well taken, for by articles I and II the claimant was bound to transport all the supplies required (needed) in the district described, to the limit of 10,000,000 pounds, and, reciprocally, the Government was thereby bound to turn over to him for that purpose all the supplies needed at said posts and places up to that limit. By article XI a covenant is *expressed* on the part of the United States that he (claimant) shall have all of said supplies to transport, with the reservation of the right only to transport of the same upon Government teams.

The second assignment of error is not well taken as an effective defence, for the reason that at the time the contract was made there was no means of transportation possible within the district other than wagon transportation, except that afforded by the Missouri river, from Fort Leavenworth and other easterly points, within the district, to Omaha, Nebraska City, and other points on the Missouri river, within the described district in Nebraska and south of 44 degrees north latitude. The river transportation described was, therefore, the only transportation which can be excluded by the words *wagon transportation*, which oc-

cur in article XI alone, and *not repeatedly*, as stated in the brief for the Government.

The fact stated by the court below "that in the summer "and autumn of 1866 the U. P. R.R. had extended their line "westward to Columbus, Lone Tree, and Kearney's Sta- "tion, and it offered to the United States a more expedi- "tious and cheaper mode of transportation than wagon "transportation," has no bearing on this case. This could not have been, and was not, relied on by the Government when this contract was made. All the posts, depots, and stations to be supplied within the district were west of each of the places mentioned, and the places mentioned were situated relatively as follows, viz: Columbus was 90 miles west of the nearest point on the Missouri river, and nearer by that distance to each and every place to be supplied than the nearest point on the Missouri river, and 200 miles nearer each post to be supplied than Fort Leavenworth; Lone Tree was 130 miles from the nearest point on the Missouri river and so much nearer each of the places to be supplied, and 250 miles nearer said places than Fort Leavenworth; Kearney Station was 190 miles distant from the nearest point on the Missouri river and so much nearer to each place to be supplied, and 290 miles nearer than Fort Leavenworth. Manifestly the cheaper and more expeditious mode of transportation afforded in the summer and autumn of 1866 by the U. P. R.R. was too doubtful to be relied upon at the time it was necessary to make CERTAIN and reliable provisions for this service on the 12th March, 1866, *for the year* 1866; for the contract made with the claimant was for transportation of supplies to all the places within the district (route 1) for the year 1866, from the west bank of the Missouri river and other places *impossible to be reached otherwise than by wagon transportation*. The contingency which happened before ser-

vice commenced on route 1, viz., cheap transportation for a short distance by railroad, gave no right to the Government to deprive the claimant of any part of the service which he was bound by the contract of March 12, 1866, to perform, and which the Government covenanted he should have the right to perform. It was not possible to divide the service on the route, for the same consideration of speed and cheapness which applied to any part of it applied to all, and if the claimant was not entitled to all he was not entitled to any. And to hold he was not entitled to any is to render the contract void and of no effect. The utmost effect that can be given by way of *restriction* of service to the words "*wagon transportation*" is to exclude the river transportation from point to point within the district.

As to the third assignment of error.

The contract does entitle the claimant to the transportation of the supplies sent from Omaha. To deny this is to affirm that the claimant was not entitled to the transportation of any supplies from the base of supply prescribed by the contract to any of the places included in the district.

As to the fourth assignment of error.

The stations on the Union Pacific railroad, from which supplies were shipped, were "depots" where military supplies were accumulated for shipment to the places within the district, and consequently were depots in the sense used in the contract.

As to the fifth assignment of error.

The parol evidence excluded could only have availed as a defence to explain that the service covered by and included within the terms of the contract was, in fact, excluded. It was therefore clearly inadmissable. If the evidence sought to be introduced had been admitted, how-

ever, it would have confirmed the right expressed in the contract of the claimant to the transportation of the supplies forwarded from Omaha to the exclusion of the short distance of railroad transportation.

The position of the claimant in respect to this service is strictly in conformity to his rights under the contract. When the Government accumulated the supplies at Omaha, the claimant, before they were removed, offered to take them from that place. When afterwards the Government determined, *without his consent*, to move them to points on the railroad, without waiving his right to transport them from the point at which they were originally deposited for transportation, he offered to transport them from the depots established on the line of the railroad.

The assumption on the part of the defence that the Government, having agreed with the claimant upon *starting-points* from which he should transport supplies during the *year* 1866 to all the posts and places within the district, had a right, notwithstanding, not only to establish *other* points of starting for transportation of the same supplies, but to let the same by contract to other parties, shows sufficiently the utter lack of any valid defence.

It is clear that the Government could not establish other points of starting than such as were described or were specified for the supplies to be transported, without the concurrence of the claimant.

But the point raised, if valid as a defence, has no facts for its base, for Omaha, the place from which the stores were shipped, was a point on the west bank of the Missouri river, north of Fort Leavenworth, and south of 42 degrees north latitude, and a depot was established there in the summer of 1866, thus, as the court below said, coming literally within the provisions of the claimant's contract as a *starting-point* for the transportation service provided for.

At the date this contract was made, no starting-points on the railroad could be agreed upon, for the reason that no part of the road was then in operation, and it could not then be foreseen whether during the year 1866 any of it would be in operation for public service, or other service than that of its own construction; and it was because of this state of things that the *indefinite* specification of *progressing termini* of the railroad, (unknown, mythical places,) to which the excluded evidence refers, was excluded. Obviously no man with intelligence would agree to receive and transport 10,000,000 pounds supplies from movable points on the open, unprotected prairies of the western wilderness.

We insist that the claimant's contract is a contract as stated on its face, (for transportation,) *for Route No. 1 for* 1866, and that, although strictly construed, he was only bound to *receive* the supplies for transportation in the months specified in Article I, yet by Article XI he was entitled to transport all (with exception specified) required to be transported during the year 1866. The route and season were such that the interests of the Government required that the supplies for the year should all be turned over to the contractor for transportation previous to the 1st of October of that year. And the facts as to that portion transported in October, 1866, by Kountz, to the transportation of which the court below held the claimant was not entitled, are that the Government agreed to have them *ready for transportation in July*, 1866, (R., pages 12 and 15.) The fact that Kountz *elected* to transport the same in October can hardly be held, therefore, as a sufficient circumstance to exclude this service from the provisions of this contract.

Evidence was offered in the court below showing that the Government, within the period specified in article I of

claimant's contract, procured transportation by the same means and from the same places as are set forth and stated by the court below as to that portion of the service which they held to be a breach of the claimant's contract of the additional quantity of 800,000 pounds supplies over the same road, to the limit of the district, viz., latitude 44 degrees north. Of the supplies thus transported, 200,000 pounds were included within Kountz's agreement to transport 500,000 pounds supplies to *Fort Reno*, (Record, page 12,) but 200,000 of the same were in point of fact carried to Phil Kearney, a point 65 miles beyond Fort Reno, and 44 miles north of the intersection of 44 degrees north latitude. Of the remainder, 300,000 pounds were carried to and beyond Fort Reno and delivered at the same place, and 300,000 pounds were carried and delivered to C. F. Smith, 90 miles beyond Phil Kearney.

We requested the court below to include this service in their findings of facts; but it was excluded from their findings and from their award of damages.

We assign this as an error. It is a part of the history of the Government that for many years the War Department has provided transportation for the posts on the plains and in the territory having the Missouri river as a base of supply into three routes, each of which included a certain specified district, being Nos. 1, 2, and 3, within each of which the respective contractors have always been held to have a monopoly of the service passing *over* and *ultimately* beyond the limits thereof. We think that under a proper construction of the claimant's contract he was entitled to the service in question to the limit of the district included in this contract.

Respectfully submitted.

DURANT & HORNOR,
for Caldwell.

DECEMBER 18, 1873.